s.21(1)(a)

s.21(1)(b)

s.23

Department of Justice Canada / Ministère de la Justice Canada

FOR INFORMATION
NUMERO DU DOSSIER/FILE #: 2016-004372
COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: Protected B

TITRE/TITLE: Information Commissioner and Clennett's Constitutional Challenge of the *Ending the Long-gun Registry Act* and Related Judicial Review

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- [redacted]

Soumis par (secteur)/Submitted by (Sector): Public Safety, Defence and Immigration

Responsable dans l'équipe du SM/Lead in the DM Team: Scott Nesbitt s.69(1)(g) re (d)

Revue dans l'ULM par/Edited in the MLU by: Matt Ignatowicz

Soumis au CM/Submitted to MO: 4 March 2016

Department of Justice Canada | Ministère de la Justice Canada

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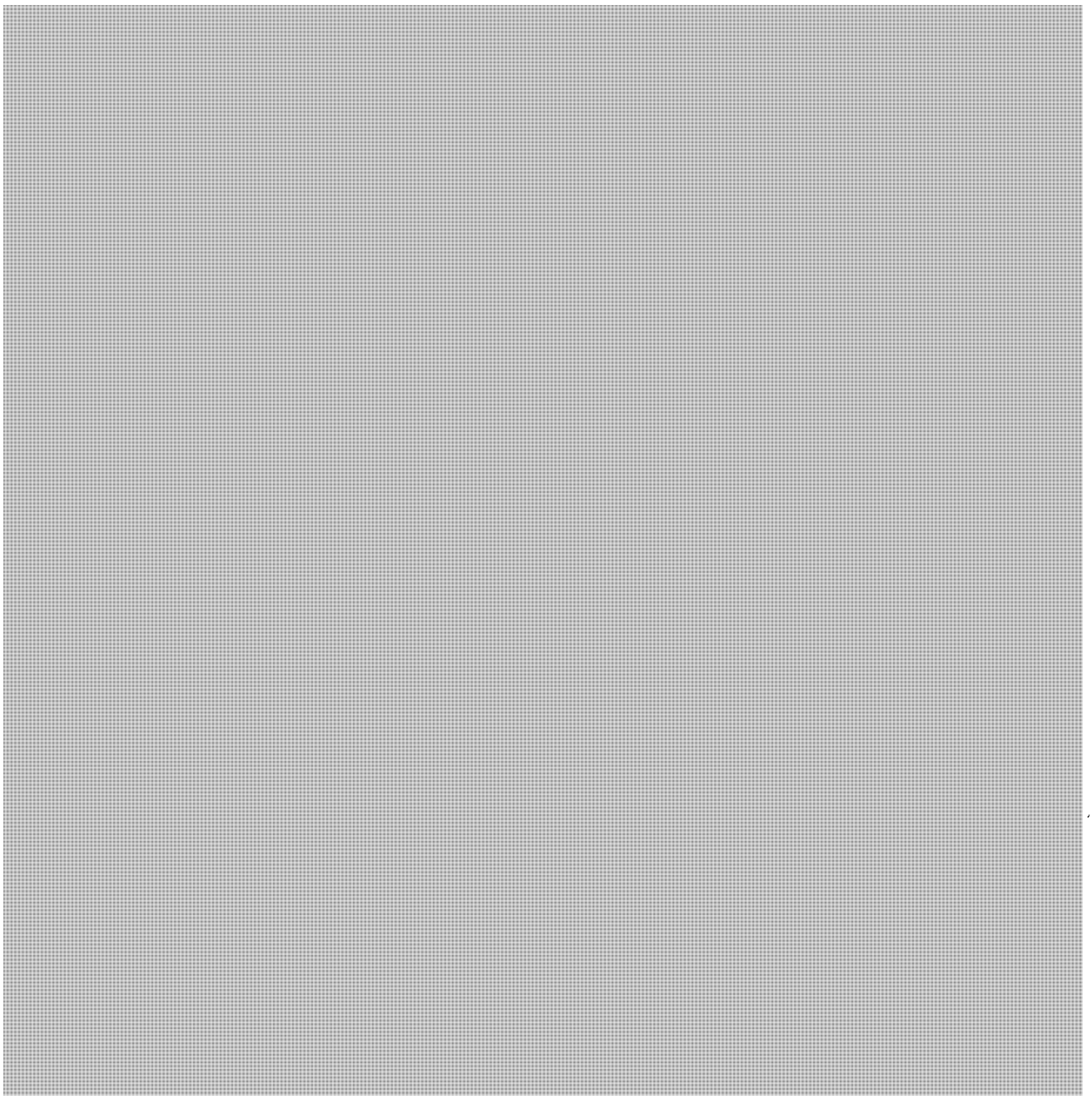
FOR INFORMATION

2016-004372

MEMORANDUM FOR THE MINISTER

Information Commissioner and Clennett's Constitutional Challenge of the *Ending the Long-gun Registry Act* and Related Judicial Review



Pages 3 to / à 4

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21(1)(a), 21(1)(b), 23

of the Access to Information Act

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21(1)(a), 21(1)(b), 23, 69(1)(g) re (d)

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SCENARIO
NUMERO DU DOSSIER/FILE #:2016-004476
COTE DE SECURITE/SECURITY CLASSIFICATION: Protected B

TITRE/TITLE: Meeting with Métis National Council President, Clément Chartier

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- A meeting with the President of the Métis National Council (MNC), Clément Chartier, is scheduled for March 15, 2016. The President of MNC has provided a list of potential topics for discussion in his meeting with you.
- Mr. Chartier has been President of MNC since 2003 and is currently serving his fourth term, a biography is attached at Annex 1.
- Mr. Chartier originally submitted a fulsome list of topics for discussion; however, at this time, there are only two substantial items on the agenda: Canada's cross appeal in the *Daniels et al. v. The Queen et al.* (Annex 2) and [redacted] (Annex 3).

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- Background information on other discussion items originally brought forward by Mr. Chartier can be found at Annexes 4 through 9.
- Given that this is the first time a Minister of Justice has met with the President of MNC in over a decade, the topics of discussion are likely to be varied and touch on a number of subjects related to Métis rights recognition, and reconciliation with the Métis Nation and Métis individuals.

Soumis par (secteur)/Submitted by (Sector): Aboriginal Affairs Portfolio

Responsable dans l'équipe du SM/Lead in the DM Team: Adam Garskey

Revue dans l'ULM par/Edited in the MLU by: Olivier Cullen

Soumis au CM/Submitted to MO: 10 March 2016

Department of Justice Canada | Ministère de la Justice Canada

s.23

Protected B
SCENARIO
2016-004476

MEMORANDUM FOR THE MINISTER

Meeting with Métis National Council President, Clément Chartier

ISSUE

This note is to support you during your meeting with the President of the Métis National Council (MNC), Clément Chartier (biography attached at Annex 1). The meeting will take place at your departmental office and is scheduled for March 15, 2016, at 8:30 a.m. The President of the MNC originally submitted a fulsome list of topics for discussion; however, at this time, there are only two substantial items on the agenda: Canada's cross appeal in *Daniels et al. v. The Queen et al.*, and [redacted]

BACKGROUND

The MNC was established in 1983 by its governing members: the Métis Nation of Ontario, the Manitoba Métis Federation, the Métis Nation-Saskatchewan, the Métis Nation of Alberta, and the Métis Provincial Council of British Columbia. The central goal of the MNC is to secure a healthy space for the Métis within Canada.

Clément Chartier has been President of the MNC since 2003 and is currently serving his fourth-term. He is a lawyer, writer, lecturer, and activist and has served in political and administrative capacities with numerous Indigenous peoples' organizations.

On April 29, 2013, Aboriginal Affairs and Northern Development Canada (now known as the Department of Indigenous and Northern Affairs (INAC)) renewed the *Métis Nation Protocol* with the MNC, which was originally signed in 2008. The purpose of the Protocol is to develop bilateral (MNC and INAC) and multilateral processes (MNC, INAC and the five western most provinces) to explore issues affecting the Métis people, including access to benefits, governance, economic development, and Aboriginal rights. The Protocol is a political agreement between the parties and lists a series of commitments related to improving the relationship between INAC and the Métis and to support discussions about matters that affect Métis people.

On February 29, 2016, members of the MNC executive met with officials from, and the Minister of INAC to discuss the priorities and commitments associated with the Government's commitment to strengthen the relationship with the Métis Nation going forward.

Your meeting with Mr. Chartier will be the first time a President of the MNC has met with a Minister of Justice in over a decade.

CONSIDERATIONS

The current agenda for your meeting with Mr. Chartier focusses on two cases: *Daniels* and [redacted]

s.21(1)(a)
s.21(1)(b)
s.23

Other possible discussion topics

Besides the two items listed above, the President of the MNC originally proposed a lengthy list of possible topics for discussion at the meeting. These include Amendments to the *Indian Act* to enable bona fide Métis Nation citizens to withdraw from Indian Status under the *Indian Act*; the Aboriginal Justice Strategy; Île-à-la-Crosse Roman Catholic (Mission) Boarding School; reinstatement of post-Powley historical research to identify historic Métis communities and homeland; and the INAC Ministerial Special Representative Report on Reconciliation and section 35 Métis rights. Detailed information on these topics can be found at Annexes 4 to 9.

CONCLUSION

Many of the other proposed discussion topics are matters that fall under the mandate of the Minister of INAC and are occurring with officials within INAC.

s.21(1)(a)
s.21(1)(b)
s.23

ANNEXES

Annex 1:	Biography of Clément Chartier
Annex 2:	Canada's cross-appeal of *Daniels et al. v. The Queen et al.*
Annex 3:	
Annex 4:	Amendments to the *Indian Act* to enable bona fide Métis Nation citizens to withdraw from Indian Status under the *Indian Act.*
Annex 5:	Aboriginal Justice Strategy
Annex 6:	Île-à-la-Crosse Roman Catholic (Mission) Boarding School
Annex 7:	Reinstatement of post-Powley historical research to identify historic Métis communities and homeland
Annex 8:	INAC Ministerial Special Representative Report on Reconciliation and s. 35 Métis rights
Annex 9:	Métis Nation Registry Standard

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Clément Chartier
President

President Chartier, a citizen of the Métis Nation, was born at Ile a la Crosse in Northwest Saskatchewan and raised in the nearby Métis community of Buffalo Narrows. He is a lawyer, writer, lecturer, and activist who has served in political and administrative capacities with numerous Indigenous peoples' organizations nationally and internationally.

President Chartier is best known for his work on Métis and Indigenous rights. In 2003, President Chartier was elected President of the Métis National Council and is currently serving his fourth-term.

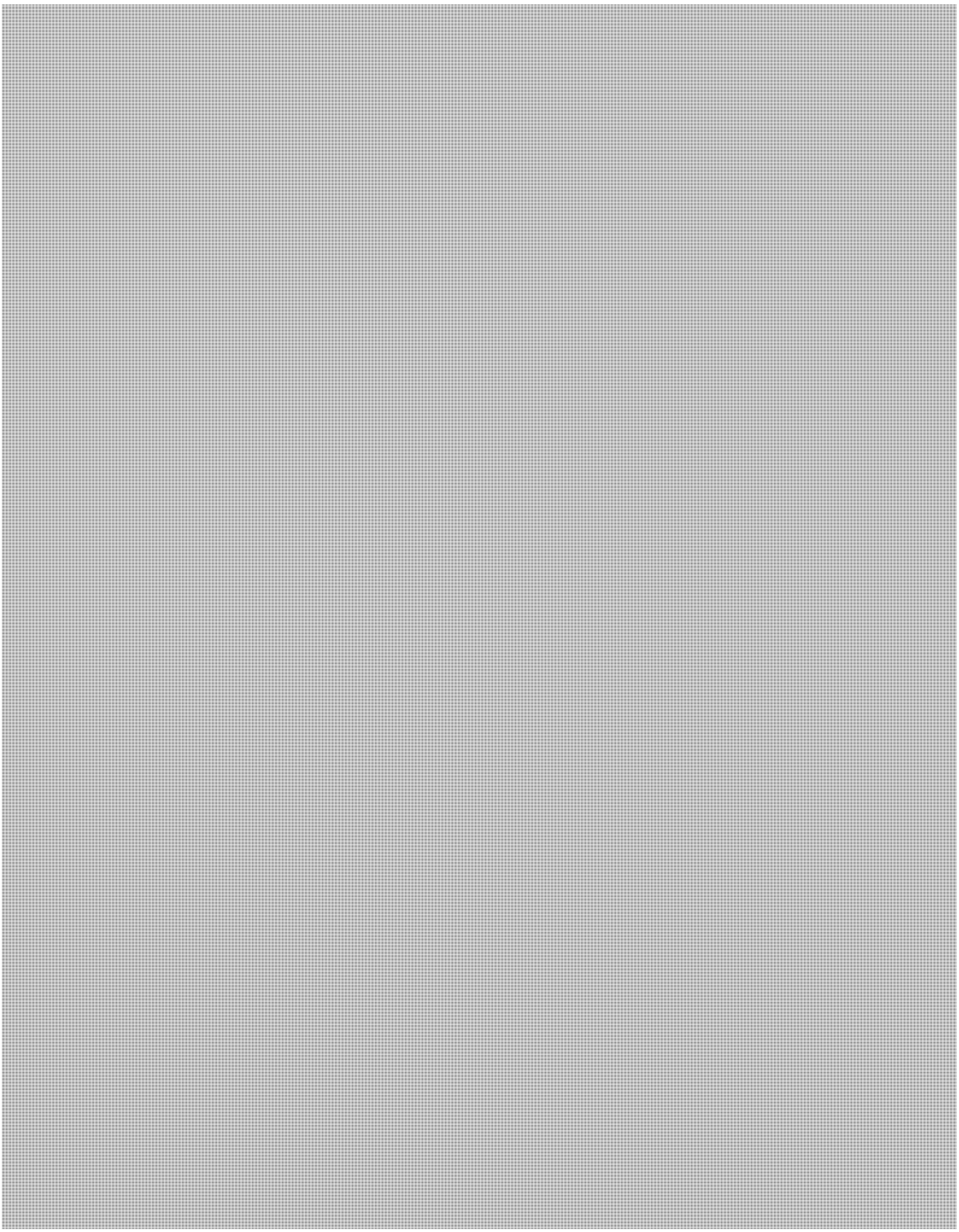
A seasoned political figure and recipient of a Queen's Counsel distinction for his work in law, President Chartier has pushed the Métis Nation's rights agenda at various levels of Canada's judicial system and continues to provide counsel in ongoing Métis-specific cases.

Focused on strengthening the Métis Nation from its core, President Chartier's goal is to move the Métis Nation closer to adopting a new modern Métis Nation Constitution.

Source: Métis Nation website, "Leadership"

Annex 2

Canada's cross-appeal of *Daniels et al. v. The Queen et al.*



Department of Justice Canada | Ministère de la Justice Canada

NUMÉRO DU DOSSIER/FILE #: 2015-013878
COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: Protected – Solicitor-Client Privilege

TITRE/TITLE: *Daniels et al. v. The Queen et al.*, Supreme Court of Canada No. 35945

[redacted]

Soumis par (secteur)/Submitted by (Sector): Aboriginal Affairs Portfolio

Responsable dans l'équipe du SM/Lead in the DM Team: Adam Garskey

Revue dans l'ULM par/Edited in the MLU by: Matt Ignatowicz

s.21(1)(a)
s.21(1)(b)
s.23

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Department of Justice Canada | Ministère de la Justice Canada

s.21(1)(a)
s.21(1)(b)
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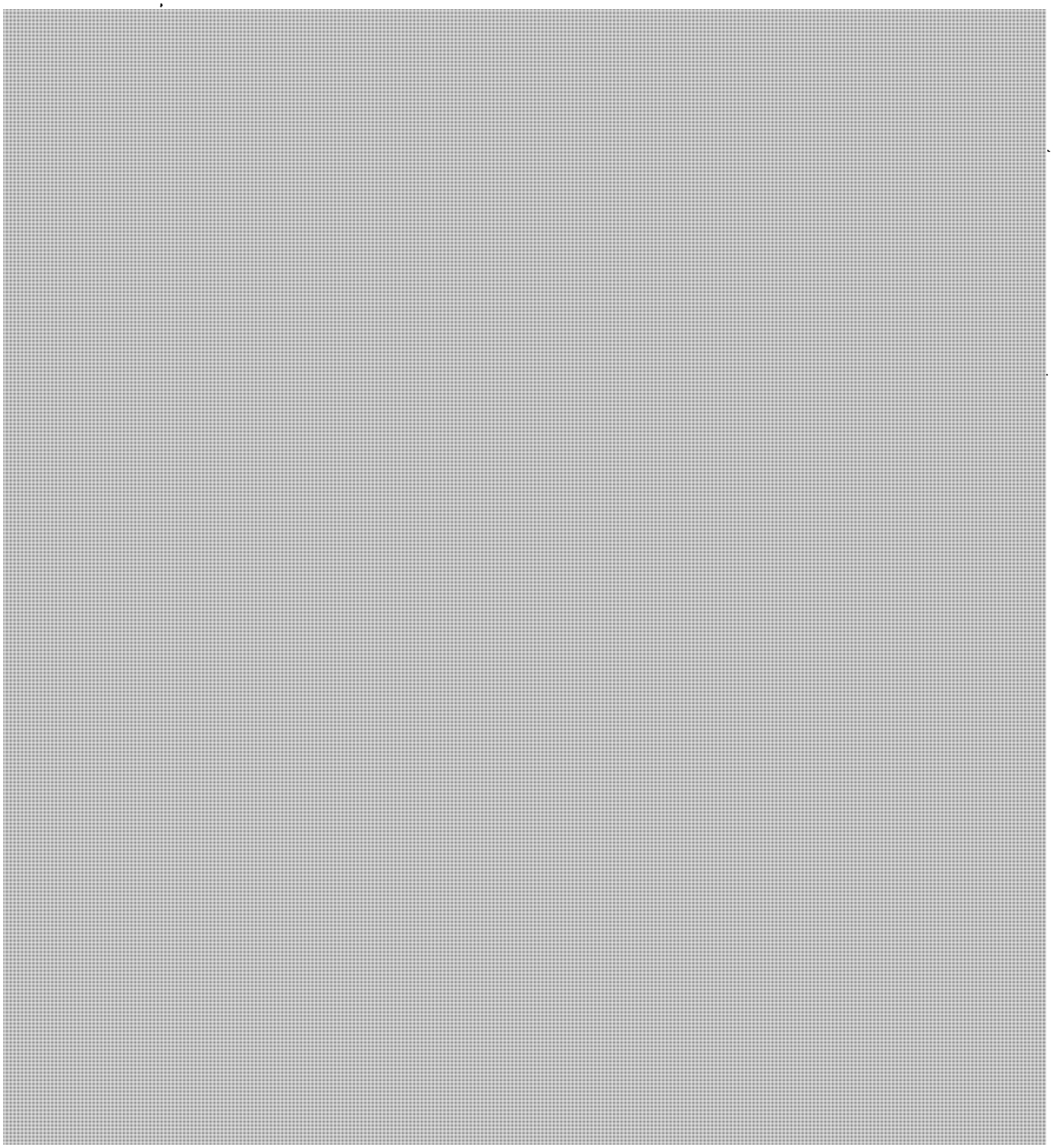
2015-013878

MEMORANDUM FOR THE MINISTER

***Harry Daniels et al. v. The Queen et al.*, Supreme Court of Canada No. 35945**



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21(1)(a), 21(1)(b), 23

of the Access to Information Act

de la Loi sur l'accès à l'information

s.21(1)(a)
s.21(1)(b)
s.23

[redacted]

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Amendments to the *Indian Act* to enable bona fide Métis Nation citizens to withdraw from Indian Status under the *Indian Act.*

The *Indian Act* does not provide a mechanism to opt out of Indian registration in order to obtain Métis membership. In order to address this matter, a legislative amendment to the *Indian Act* would be required to allow Métis to "withdraw" or "de-register". INAC is currently considering the impacts of making such amendments. [redacted] It seems likely that a legislative amendment could be introduced in Parliament for this purpose. However, it is also possible that opposition by First Nation groups to such an amendment could be so great that the amendment could be significantly delayed or even defeated.

BACKGROUND

This proposal is Métis driven. Alberta has provincial legislation for Métis. This legislation allows for provincial benefits for Métis, namely entitlement to reside in a Métis community, on Métis Settlement Lands. Currently, there are about 9,000 residents in the eight Métis communities under the auspices of the *Métis Settlements Act.* Residency, however, is predicated on obtaining membership in a Métis community. Métis membership rules exclude registered Indians. The *Indian Act* does not provide a mechanism to opt out of Indian registration in order to obtain Métis membership. A legislative amendment to the *Indian Act* would be required to allow Métis to "withdraw" or "de-register".

An amendment to allow de-registration is controversial because it would have the same effect as "enfranchisement" which is politically opposed by First Nations. Enfranchisement was a feature of previous *Indian Acts* which ceased with the 1985 *Indian Act* amendments known then (and still) as Bill C-31. These *Indian Acts* provided for both optional enfranchisement and involuntary enfranchisement.

Both types of enfranchisement came to be seen as fundamentally unfair, often harsh in their effects, and ultimately designed to absorb Indians into mainstream Canada. Enfranchisement became synonymous with assimilation. In 1985 the power to enfranchise was removed in the belief that it would have constituted unconstitutional discrimination under the *Canadian Charter of Rights and Freedoms.*

LOOKING FORWARD

[redacted]

s.21(1)(a)
s.21(1)(b)
s.23

Aboriginal Justice Strategy

The Aboriginal Justice Strategy (AJS) supports Aboriginal community-based justice programs that offer alternatives to mainstream justice processes in appropriate circumstances. AJS programs have delivered results in reducing crime and victimization in Aboriginal communities, lowering recidivism, and reducing the over-representation of Aboriginal people in the criminal justice system. These programs are cost-effective and produce short- and long-term savings for governments by freeing up police, court, and correctional resources to address more serious crime. The AJS supports approximately 200 programs that reach over 750 Aboriginal communities across Canada, including on- and off-reserve, rural, urban, and Northern communities.

Background

Since 1991, the Aboriginal Justice Strategy (AJS) has been providing support to Aboriginal community-based justice programs that offer alternatives to mainstream justice processes in appropriate circumstances. AJS programs are unique as the services offered are culturally relevant and based on the justice-related priorities identified by the community in which the program operates.

They have been proven to play an important role in reducing crime and helping to address the over-representation of Aboriginal people in the criminal justice system by lowering the rate at which Aboriginal people reoffend. While federally-led, the AJS is cost-shared with provinces and territories.

The AJS comprises two funds: the Community-Based Justice Fund and the Capacity-Building Fund.

The primary focus for most AJS community-based justice programs are diversions from the mainstream justice system, which are funded under the Community-Based Justice Fund. The AJS provides funding to approximately 200 community-based justice programs that reach over 750 Aboriginal communities in all jurisdictions. In 2014-15, over 11,600 Aboriginal people were referred to AJS community-based justice programs.

Shorter term capacity-building and training efforts are funded via the Capacity-Building Fund, which will have supported 40 projects during the 2015–16 fiscal year.

The AJS has the bulk of its funding ($11 million annually) that is "renewable." Two years of funding at status quo levels of $11 million annually was announced in Economic Action Plan 2014, while a third year of funding at status quo levels was announced by the previous government on February 14, 2015. As a result of the announcement of the third year of funding, this $11 million AJS funding is now scheduled to sunset on March 31, 2017. Decisions on the continuation of this funding will be determined, through Cabinet processes, at the appropriate time.

Any proposal for deregistration entails consideration of the impacts on descendants of deregistered Indians, both living and yet unborn, as well as restrictions on re-registration following de-registration.

Implementation of deregistration could entail pay-out of per-capita First Nation assets to band members, which First Nations could resist. As well, many First Nations control their own band membership (separate from *Indian Act* registration) and their rules may preclude deregistration. INAC may not be able to enforce the return of Certificates of Indian Status from deregistered Indians, which could increase fraudulent access to government services and fraudulent tax exemption claims.

Some non-Métis Indians seek deregistration to facilitate registration with tribes in the United States. Other individuals, including some women who became Indians on marriage before 1985, seek de-registration for personal reasons. These people could bring equality challenges if only Métis are allowed to deregister.

s.21(1)(a)
s.21(1)(b)
s.23

Île-à-la-Crosse Roman Catholic (Mission) Boarding School

The MNC has raised this matter in previous correspondence with the Prime Minister as well as with the Minister of Indigenous and Northern Affairs. The Boarding school was found to not meet the test for addition to the Settlement Agreement and therefore no claims from children who attended that school have been part of the Indian Residential School Resolution process.

This is a matter that falls within the mandate of the Minister of Indigenous and Northern Affairs and discussions are occurring with departmental officials of INAC.

BACKGROUND

The Île-à-la-Crosse Roman Catholic (Mission) Boarding School, attended by Métis students, many from La Loche community in Saskatchewan, was owned and operated by the Roman Catholic Church (the Oblates of Mary Immaculate) for its entire period of operation, 1917 to 1976. Prior to this, a School at Île-à-la-Crosse appears to have been established in 1869 and was supported solely by the Roman Catholic Mission there until 1896, after which some funding for up to 20 students was received from the Lieutenant Governor of the North West Territories.

However, in 1906, the federally funded boarding school that had existed at Île-à-la-Crosse ceased and all federally-sponsored children were moved to a new school site at Lac la Plonge (which became the Beauval Indian Boarding School). Research indicates that educational facilities, including boarding facilities, continued to be available to children Île-à-la-Crosse after 1906; however, these facilities were under the control of the Roman Catholic Church and the Government of Saskatchewan.

CONSIDERATIONS

An application was made in 2007 to INAC to have the Île-à-la-Crosse Boarding School added as an institution in Schedule "F" under the Indian Residential School Settlement Agreement.

Article 12 of Settlement Agreement sets out a two-part test that is used to assess each requested institution to determine if it should be recognized as an Indian residential school:

a) The child was placed in a residence away from the family home by or under the authority of Canada for the purposes of education; and,

b) Canada was jointly or solely responsible for the operation of the residence and care of the children resident there.

Research into the history of the schools at Île-à-la-Crosse was undertaken to assess the application. As a result of lack of evidence of Federal Government involvement in its administration, a determination was made by INAC that the Île-à-la-Crosse Roman Catholic Boarding School did not meet the test established in Article 12 of the Indian Residential School Settlement Agreement for an addition of an institution to the Settlement Agreement.

It should be noted that the Federal Attorney General has been named as a Defendant in twelve claims by persons who attended the school in Ile-a-la-Crosse. Five of the Claimants were, and continue to be, non-status or Métis. [redacted]

s.21(1)(a)
s.21(1)(b)
s.23

Re-instatement of Post Powley historical research to identify historic Métis communities and homeland

Following the 2003 Supreme Court of Canada decision in *Powley*, the Department of Justice, working together with INAC, developed and managed a program which included 15 history-based research projects in order to provide data with which to inform discussions that would assist in developing an understanding of how to interpret and apply the Powley decision.

The government has recently committed to providing more secure funding for Métis Organizations engaging in historic research to identify historic Métis communities and rights-bearing Métis. INAC officials have begun to look at options related to Powley funding; however, the development of approaches to implement the commitment on funding remains in the preliminary stage. This is a matter that falls within the mandate of the Minister of Indigenous and Northern Affairs and discussions are occurring with departmental officials of INAC.

BACKGROUND

Following the 2003 Supreme Court of Canada *Powley* decision, the government created a post-*Powley* response working group with representation from a number of interested federal departments. An important early task of this working group was to come to an understanding of the implications of the *Powley* decision for the federal government. The Department of Justice, working together with INAC, developed and managed a program which included 15 history-based research projects. These particular research projects were designed to explore the history related to possible Métis ethnogenesis and the imposition of 'effective European control' in selected sites across Canada. The purpose of this was to provide information which might be used to discuss the possible existence of particular historic Métis communities across Canada and, generally, provide data with which to inform discussions that would assist in developing an understanding of how to interpret and apply the *Powley* decision.

With respect to historic research undertaken by Métis Organizations to identify Métis communities and rights-holding Métis individuals, the government has recently committed to converting current year-to-year funding made available for Métis identification and registration (*Powley* funding) into a permanent initiative to provide an ongoing and reliable base of funding for recipient Métis organizations to identify Métis rights-holders.

INAC officials have begun to look at options related to *Powley* funding; however, the development of approaches to implement the commitment on funding remains in the preliminary stage.

INAC Ministerial Special Representative Report on Reconciliation and s. 35 Métis rights

The INAC Ministerial Special Representative Tom Isaac has completed formal engagement with external stakeholders (i.e., Métis organizations and provinces/territories) to fulfill a two-part mandate. Mr. Isaac is in the process of preparing a report for the Minister of INAC, which is expected to provide recommendations on these matters.

This is a matter that falls within the mandate of the Minister of Indigenous and Northern Affairs; discussions are occurring with departmental officials of INAC.

Background

Mr. Isaac was appointed on June 4, 2015, by the INAC minister as the Ministerial Special Representative to Lead Engagement with Métis. The initiative is part of Canada's broader commitment to work with partners to develop a new reconciliation framework for addressing Section 35 Aboriginal rights.

The Ministerial Special Representative has a two-part mandate:

- to lead engagement with the Métis National Council, its governing members, Métis Settlements General Council, provincial and territorial governments, other Indigenous organizations and interested parties to map out a process for dialogue on Section 35 Métis rights; and
- to engage with the Manitoba Métis Federation to explore ways to advance dialogue on reconciliation with Métis in Manitoba in response to the 2013 *Manitoba Métis Federation et al. v. Canada* decision of the Supreme Court of Canada.

During the engagement period, the Ministerial Special Representative met with the Métis National Council, its governing members, Métis Settlements General Council, provincial and territorial governments, other Indigenous organizations and interested parties to map out a process for dialogue on Section 35 Métis rights.

CONSIDERATIONS

The Ministerial Special Representative completed his formal engagement with external stakeholders (i.e., Métis organizations and provinces/territories) in late January 2016. Now that the active engagement period is complete, the Ministerial Special Representative is in the process of preparing a written report to the Minister of INAC, which is expected to provide recommendations on the design of a process for productive and constructive dialogue in support of a Section 35 Métis Rights Framework. The report will also provide recommendations on the elements that could inform exploratory discussions to advance reconciliation in response to the Supreme Court decision in *Manitoba Métis Federation et al. v. Canada.*

Métis Nation Registry Standard

In 2011, INAC engaged the Canadian Standards Association group (CSA) to develop a common standardized approach for assessing the quality and integrity of membership systems employed by the five Métis National Council provincial affiliate organizations. The Métis Nation Registry Operations Standard is now published and provides a methodology for verification, in partnership with willing provincial governments and Métis organizations that includes descriptions of proposed organizational responsibilities, and a path forward outlining next steps in building capacity and competencies needed to implement the program according to the strategies.

This is a matter that falls within the mandate of the Minister of Indigenous and Northern Affairs; discussions are occurring with departmental officials of INAC.

Background

Métis have maintained their own membership identification systems, and determined their own membership criteria for years. Unlike the situation for First Nations, the Government of Canada neither defines—nor maintains—a registry system of Métis individuals.

In the 2003 Supreme Court of Canada's (SCC) *Powley* decision, the first SCC decision to affirm section 35 Métis Aboriginal rights, it pointed out that it was imperative that the existing Métis membership systems become objectively verifiable so that governments could rely upon the information contained within. The SCC, while not defining Métis, set out key criteria for the identification of a Métis individual who may assert an Aboriginal right.

In 2004, the Government of Canada began to work with, and fund, Métis organizations who had membership criteria consistent with the SCC criteria, and who were willing to allow their membership systems to be reviewed from time to time to ensure an objectively verifiable system. The Government of Canada developed a funding process under this initiative where each organization had to develop and submit workplans for the construction and management of these systems with the overall goal of creating an objectively verifiable system.

In 2008, the Office of the Federal Interlocutor hired an independent third party for an initial review of the integrity of the new processes put in place for the membership identification systems and evaluate the progress achieved, as well as to provide recommendations for areas of improvement. The review was shared with Métis organizations and their respective provincial governments in order that there be a common understanding of the results and that mid-course adjustments could be made in the continuing development of the systems.

The review highlighted that the five identification systems evaluated would benefit from common approaches, terminology, and a basis by which they can be objectively verified. In 2011, the Department engaged the Canadian Standards Association group (CSA) to develop a common standardized approach for assessing the quality and integrity of membership systems employed by the five Métis National Council provincial affiliate organizations.

The Métis Nation Registry Operations Standard is now published and available online.

The Standard provides a methodology for verification, in partnership with willing provincial governments and Métis organizations, which includes descriptions of proposed organizational responsibilities and a path forward outlining next steps in building capacity and competencies needed to implement the program according to the strategies.

This principled approach will help map out a pathway towards where governments can have confidence in the Métis membership identification systems for a variety of purposes.

Department of Justice Canada | Ministère de la Justice Canada

s.21(1)(a)
s.21(1)(b)
s.23

FOR INFORMATION
NUMERO DU DOSSIER/FILE #: 2016-004552
COTE DE SECURITE/SECURITY CLASSIFICATION: Protected B

TITRE/TITLE: Fetal Alcohol Spectrum Disorder and the Criminal Justice System

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- This note provides information about the issue of fetal alcohol spectrum disorder (FASD) and the criminal justice system.
- On Februrary 26, 2016, Larry Bagnell (Yukon-Liberal) introduced *An Act to amend the Criminal Code and the Corrections and Conditional Release Act (fetal alcohol disorder).* If the Member moves the Bill, it is not expected to come up for debate until June 2016.
- Bill C-235 seeks to address concerns that offenders with FASD do not have the same level of moral blameworthiness as other offenders by: amending the *Criminal Code* to define FASD; provide an FASD assessment power for the purposes of bail and sentencing; deeming FASD as a mitigating factor for the purpose of sentencing; and creating an "external support plan" to be ordered as part of probation in all situations when an offender has FASD.
- The goal of providing special considerations in the *Criminal Code* for individuals with FASD is laudable.
- [redacted]
- [redacted]

Soumis par (secteur)/Submitted by (Sector): Policy Sector

Responsable dans l'équipe du SM/Lead in the DM Team: Scott Nesbitt / Caroline Leclerc

Revue dans l'ULM par/Edited in the MLU by: Matt Ignatowicz

Soumis au CM/Submitted to MO: March 10, 2016

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FOR INFORMATION

2016-004552

MEMORANDUM FOR THE MINISTER

Fetal Alcohol Spectrum Disorder and the Criminal Justice System.

ISSUE

This note provides information about the issue of fetal alcohol spectrum disorder (FASD) and the criminal justice system. This information is being provided in the context of the recently tabled Private Member's Bill (PMB) C-235, *An Act to amend the Criminal Code and the Corrections and Conditional Release Act (fetal alcohol disorder)*, introduced by Larry Bagnell (Yukon-Liberal) on February 26, 2016. The Bill is not expected to come up for debate until June 2016.

BACKGROUND

FASD is an umbrella term used to describe various forms of permanent brain damage caused by prenatal exposure to alcohol. While some individuals with FASD have visible facial deformities, the vast majority do not demonstrate any physical traits. Because of this, FASD is often referred to as an "invisible disability." Individuals with FASD also suffer from cognitive disabilities such as impaired judgement, poor memory, impulsiveness, and have difficulties linking events with their consequences, making it difficult for them to learn from their mistakes. As such, individuals with FASD are at risk of coming into contact with the criminal justice system, especially if they are not supported in the community.

It is estimated that sixty percent of individuals with FASD end up in trouble with the law and ninety percent of individuals with FASD have other co-occurring mental health issues (e.g., attention deficit hyperactivity disorder) (Streissguth, et. al., 2004).

The exact prevalence of FASD in Canadian society and in the criminal justice system is unknown. Based on limited data, Health Canada estimates that nine babies out of every 1,000 live births have FASD. There is also a paucity of data on FASD in corrections. One study found that ten percent of a small sample size of ninety-one inmates in a federal institution were found to have FASD and another sixteen inmates were found to possibly have FASD, but not enough information was known (Chudley and McPherson, 2007). An FASD prevalence study (supported by the Department of Justice Canada) is currently underway in the Yukon corrections population, and results are expected shortly.

CONSIDERATIONS

Bill C-235 seeks to address concerns that offenders with FASD do not have the same level of moral blameworthiness as other offenders. It is based on a 2013 Resolution of the Canadian Bar Association (CBA). A copy of the Bill is attached at Annex 1.

s.21(1)(a)

s.21(1)(b)

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The Bill proposes to amend the *Criminal Code* in four ways:

- It would define FASD for the purposes of the criminal justice system;
- It would provide a new power for the court to order FASD-specific assessments for the purpose of bail and sentencing and two purposes regarding youth sentences under subsections 105(1) and 109(2) of the *Youth Criminal Justice Act* (YCJA);
- It would require FASD to be considered as a mitigating factor for the purposes of sentencing; and
- It would require the court to order an "external support plan" as a condition of probation if the offender had FASD.

The Bill also seeks to amend the *Corrections and Conditional Release Act* (CCRA) to specifically mention FASD as a subset of mental health issues and to require that Correctional Services Canada (CSC) provide FASD-specific programs. As the CCRA amendments fall under the purview of the Minister of Public Safety and Emergency Preparedness, this note will focus only the elements of the Bill that implicate the *Criminal Code*.

The goal of providing special considerations in the *Criminal Code* for individuals with FASD is laudable.

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is withheld pursuant to sections

est retenue en vertu des articles

21(1)(a), 21(1)(b), 23

of the Access to Information Act

de la Loi sur l'accès à l'information

s.21(1)(a)
s.21(1)(b)
s.23

[redacted]

Truth and Reconciliation Commission

The Truth and Reconciliation Report called upon the Government to address FASD in three of its Calls to Action (i.e., Calls to Action 32, 33, and 34). Of the two that dealt with legislative reform, the focus was on the issue of sentencing and the ability of trial judges to depart from mandatory minimum penalties. The remaining elements of the calls to action dealt with issues such as increased diagnostic capacity and community supports. [redacted]

Previous PMBs in Parliament

Bill C-583, *an Act to amend the Criminal Code (fetal alcohol spectrum disorder)*, introduced by Member of Parliament Ryan Leef (Yukon-Conservative) in the previous Parliament, was substantially similar to PMB C-235. During Second Reading debate, that Bill was withdrawn by the sponsor and the subject matter was referred to the Standing Committee on Justice and Human Rights for further study. The Committee released its report titled "Study of the Subject Matter of Bill C-583, *An Act to Amend the Criminal Code (Fetal Alcohol Spectrum Disorder).*" The Committee did not recommend any *Criminal Code* reform as a means to respond to FASD and instead, issued seven recommendations for further work in the area of upstream investments, diversion, training, awareness, and research. The Government Response outlined the various policy and program areas where the federal government is investing in the issue of FASD.

Following the release of the Standing Committee Report, Member of Parliament Sean Casey (Charlottetown – Liberal) introduced PMB C-656, which was substantially similar to both former Bill C-583 and Bill C-235. Unlike C-583, both Bill C-656 and C-235 include the "external support plan" element and the proposed CCRA amendments.

Federal-provincial-territorial considerations

Both Yukon and British Columbia made public statements about PMB C-583. The Yukon Legislature unanimously passed Motion 638 in April 30, 2014, which called on the federal government to support Bill C-583 by, among other things, providing funds to fully cover all additional costs to implement the legislation. However, the Attorney General of British Columbia wrote to the Standing Committee on Justice and Human Rights during their study of the subject matter of PMB C-583 to note the challenges associated with the Bill, specifically the challenges of addressing only one disorder and the costs associated with court-ordered assessments. She proposed alternative ways to address the issue of FASD, including through other *Criminal Code* amendments.

s.21(1)(a)

s.21(1)(b)

s.23

Federal/Provincial/Territorial (FPT) Ministers Responsible for Justice and Public Safety have identified FASD as a priority item and are currently waiting for a report from officials on similar recommendations to those found in Bill C-235.

CONCLUSION

The goal of improving outcomes for individuals with FASD who come into contact with the justice system is laudable;

[redacted]

ANNEX 1: Bill C-235, *An Act to amend the Criminal Code and the Corrections and Conditional Release Act (fetal alcohol disorder)*

PREPARED BY
Joanna Wells
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Criminal Law Policy Section
613-948-7419

First Session, Forty-second Parliament,
64-65 Elizabeth II, 2015-2016

HOUSE OF COMMONS OF CANADA

BILL C-235

An Act to amend the Criminal Code and the Corrections and Conditional Release Act (fetal alcohol disorder)

FIRST READING, FEBRUARY 25, 2016

MR. BAGNELL

Première session, quarante-deuxième législature,
64-65 Elizabeth II, 2015-2016

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-235

Loi modifiant le Code criminel et la Loi sur le système correctionnel et la mise en liberté sous condition (troubles causés par l'alcoolisation foetale)

PREMIÈRE LECTURE LE 25 FÉVRIER 2016

M. BAGNELL

421177

SUMMARY

This enactment amends the *Criminal Code* to establish a procedure for assessing individuals who are involved in the criminal justice system and who may suffer from a fetal alcohol disorder. It requires the court to consider, as a mitigating factor in sentencing, a determination that the offender suffers from a fetal alcohol disorder.

The enactment also requires the court to make orders to require individuals who are determined to suffer from a fetal alcohol disorder to follow an external support plan to ensure that they receive the necessary support to facilitate their successful reintegration into society.

Lastly, it makes consequential amendments to the *Corrections and Conditional Release Act*.

SOMMAIRE

Le texte modifie le *Code criminel* afin d'établir une procédure permettant l'évaluation des personnes confrontées au système de justice pénale qui pourraient être atteintes de troubles causés par l'alcoolisation foetale. Il exige du tribunal que celui-ci considère comme circonstance atténuante, pour la détermination de la peine, le fait que le délinquant est atteint de ces troubles.

Il oblige également le tribunal à ordonner aux personnes atteintes de ces troubles de suivre un plan de soutien externe afin qu'elles reçoivent le soutien dont elles ont besoin pour leur réinsertion sociale.

Il modifie enfin la *Loi sur le système correctionnel et la mise en liberté sous condition* en conséquence.

Available on the Parliament of Canada Web Site at the following address:
http://www.parl.gc.ca

Disponible sur le site Web du Parlement du Canada à l'adresse suivante :
http://www.parl.gc.ca

1st Session, 42nd Parliament,
64-65 Elizabeth II, 2015-2016

HOUSE OF COMMONS OF CANADA

BILL C-235

An Act to amend the Criminal Code and the Corrections and Conditional Release Act (fetal alcohol disorder)

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

R.S., c. C-46

Criminal Code

1 Section 2 of the *Criminal Code* is amended by adding the following in alphabetical order:

fetal alcohol disorder refers to any neurodevelopmental disorder that is associated with prenatal alcohol exposure — the spectrum of these disorders being commonly known as fetal alcohol spectrum disorder (FASD) — and that is characterized by permanent organic brain injury and central nervous system damage that result in a pattern of permanent birth defects, the symptoms of which include

(a) impaired mental functioning,

(b) poor executive functioning,

(c) memory problems,

(d) impaired judgment,

(e) impaired ability to control impulse behaviour, and

(f) impaired ability to understand the consequences of one's actions; (*troubles causés par l'alcoolisation foetale*)

2 The Act is amended by adding the following after section 672:

1re session, 42e législature,
64-65 Elizabeth II, 2015-2016

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-235

Loi modifiant le Code criminel et la Loi sur le système correctionnel et la mise en liberté sous condition (troubles causés par l'alcoolisation foetale)

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

L.R., ch. C-46

Code criminel

1 L'article 2 du *Code criminel* est modifié par adjonction, selon l'ordre alphabétique, de ce qui suit :

troubles causés par l'alcoolisation foetale Troubles neurologiques du développement liés à l'exposition prénatale à l'alcool — souvent regroupés sous l'appellation « ensemble des troubles causés par l'alcoolisation foetale » (ETCAF) — qui se caractérisent par des lésions organiques permanentes au cerveau et des dommages au système nerveux central ayant pour conséquence des déficiences congénitales permanentes se manifestant chez un individu notamment par les symptômes suivants :

a) troubles du fonctionnement intellectuel;

b) fonctions exécutives faibles;

c) troubles de la mémoire;

d) jugement affaibli;

e) capacité réduite de maîtriser son impulsivité;

f) capacité réduite de comprendre les conséquences de ses actions. (*fetal alcohol disorder*)

2 La même loi est modifiée par adjonction, après l'article 672, de ce qui suit :

PART XX.01

Fetal Alcohol Disorder

Interpretation

Definitions

672.01 The following definitions apply in this Part.

accused includes a defendant in summary conviction proceedings and an accused in respect of whom a verdict of not criminally responsible on account of mental disorder has been rendered. (*accusé*)

assessment means a fetal alcohol disorder assessment. (*évaluation*)

court includes a summary conviction court as defined in section 785, a judge, a justice and a judge of the court of appeal as defined in section 673. (*tribunal*)

qualified person means a person duly qualified by provincial law to practise medicine or psychiatry or to carry out psychological examinations or assessments, as the circumstances require, or, if no such law exists, a person who is, in the opinion of the court, so qualified, and includes a person or a member of a class of persons designated by the lieutenant governor in council of a province or his or her delegate. (*personne compétente*)

Assessment Order

Fetal alcohol disorder assessment

672.02 (1) A court may, at any stage of proceedings against an accused, by order require that the accused be assessed by a qualified person, alone or with the input of other qualified persons, to determine whether the accused suffers from a fetal alcohol disorder and, if so, to indicate the relative severity of the disorder. The assessment may be ordered

(a) on application of the accused;

PARTIE XX.01

Troubles causés par l'alcoolisation foetale

Définitions

Définitions

672.01 Les définitions qui suivent s'appliquent à la présente partie.

accusé S'entend notamment d'un défendeur dans des poursuites par voie de procédure sommaire et d'un accusé à l'égard duquel un verdict de non-responsabilité criminelle pour cause de troubles mentaux a été rendu. (*accused*)

évaluation Évaluation destinée à établir s'il y a présence de troubles causés par l'alcoolisation foetale. (*assessment*)

personne compétente Personne qui remplit les conditions requises par la législation d'une province pour pratiquer la médecine ou la psychiatrie, ou pour accomplir des examens ou évaluations psychologiques, selon le cas, ou, en l'absence d'une telle législation, la personne que le tribunal estime compétente en la matière. Est en outre une personne compétente celle qui est désignée comme telle, à titre individuel ou au titre de son appartenance à une catégorie, par le lieutenant-gouverneur en conseil d'une province ou son délégué. (*qualified person*)

tribunal S'entend notamment d'une cour des poursuites sommaires au sens de l'article 785, d'un juge, d'un juge de paix et d'un juge de la cour d'appel au sens de l'article 673. (*court*)

Ordonnance d'évaluation

Évaluation — troubles causés par l'alcoolisation foetale

672.02 (1) Le tribunal peut, à toute étape des procédures dirigées contre l'accusé, exiger par ordonnance que l'accusé soit évalué par une personne compétente, seule ou en collaboration avec d'autres personnes compétentes, en vue de déterminer si celui-ci est atteint de troubles causés par l'alcoolisation foetale et, le cas échéant, d'en préciser le degré de gravité. L'évaluation peut être ordonnée :

a) soit à la demande de l'accusé;

(b) on application of the prosecutor if the accused raised the issue of a possible fetal alcohol disorder or if the prosecutor satisfies the court that there are reasonable grounds to believe that the accused suffers from a fetal alcohol disorder; or

(c) by the court on its own motion, if the court believes a medical, psychological or psychiatric assessment in respect of the accused is necessary for a purpose mentioned in paragraphs (2)(a) to (d) and the court has reasonable grounds to believe that the accused may be suffering from a fetal alcohol disorder.

Purpose of assessment

(2) A court may make an order under subsection (1) in respect of an accused for the purpose of

(a) considering an application under section 515 (judicial interim release);

(b) making or reviewing a sentence;

(c) setting conditions under subsection 105(1) of the *Youth Criminal Justice Act* (conditional supervision); or

(d) making an order under subsection 109(2) of the *Youth Criminal Justice Act* (conditional supervision).

Expeditious assessment

(3) A qualified person shall conduct the assessment as soon as practicable and report the results of the assessment in writing to the court.

Copies of reports to accused and prosecutor

(4) Copies of any report filed with the court shall be provided without delay to the prosecutor, the accused and any counsel representing the accused.

Evidence may be presumed

672.03 If the court is satisfied that there is good reason the evidence of alcohol consumption by the mother of the accused while she was pregnant with him or her is not available, such as in circumstances in which the mother has died or cannot be identified or found, the cause of the disorder of the accused may be presumed to be the maternal consumption of alcohol.

b) soit à la demande du poursuivant si l'accusé a soulevé la question d'un éventuel trouble causé par l'alcoolisation foetale ou si le poursuivant démontre au tribunal qu'il existe des motifs raisonnables de croire que l'accusé est atteint de troubles causés par l'alcoolisation foetale;

c) soit d'office, si le tribunal estime qu'une évaluation médicale, psychologique ou psychiatrique concernant l'accusé est nécessaire à l'une des fins visées aux alinéas (2)a) à d) et qu'il a des motifs raisonnables de croire que l'accusé pourrait être atteint de troubles causés par l'alcoolisation foetale.

Buts de l'évaluation

(2) Le tribunal peut rendre l'ordonnance visée au paragraphe (1) à l'égard de l'accusé afin, selon le cas :

a) d'examiner une demande présentée en vertu de l'article 515 (mise en liberté provisoire par voie judiciaire);

b) d'infliger ou de réviser une peine;

c) de prévoir les conditions visées au paragraphe 105(1) de la *Loi sur le système de justice pénale pour les adolescents* (liberté sous condition);

d) de rendre l'ordonnance visée au paragraphe 109(2) de la *Loi sur le système de justice pénale pour les adolescents* (liberté sous condition).

Célérité

(3) La personne compétente procède dès que possible à l'évaluation et présente au tribunal un rapport écrit des résultats de celle-ci.

Copies à l'accusé et au poursuivant

(4) Des copies du rapport déposé auprès du tribunal sont envoyées sans délai au poursuivant, à l'accusé et à l'avocat qui le représente.

Preuve présumée

672.03 Si le tribunal est convaincu qu'il y a une raison valable pour laquelle il est impossible de prouver la consommation d'alcool par la mère de l'accusé durant la grossesse, notamment dans les cas où la mère est décédée ou inconnue ou ne peut être localisée, il peut être présumé que les troubles de l'accusé résultent de la consommation d'alcool par la mère.

Custody for assessment

672.04 (1) Subject to subsection (2) and section 672.05, a court may, for the purpose of an assessment under section 672.02, remand an accused to any custody that it directs for a period not exceeding 30 days.

Grounds for remanding

(2) An accused shall not be remanded in custody in accordance with an order made under subsection (1) unless

(a) the court is satisfied that on the evidence custody is necessary to conduct an assessment of the accused; or

(b) the accused is required to be detained in custody in respect of any other matter or by virtue of any provision of this Act.

Report of qualified person in writing

(3) For the purposes of paragraph (2)(a), if the prosecutor and the accused agree, evidence of a qualified person may be received in the form of a report in writing.

Application to vary assessment order

672.05 At any time while an order made under subsection 672.02(1) is in force, a court may, on cause being shown, vary the terms and conditions specified in the order in any manner that the court considers appropriate in the circumstances.

Assessment not ordered by court

672.06 An assessment made by a qualified person as to whether an accused suffers from a fetal alcohol disorder may be admitted as evidence for a purpose set out in paragraphs 672.02(2)(a) to (d) even if the assessment was not made as a result of an order by the court under subsection 672.02(1).

Report to be part of record

672.07 A report made following an assessment ordered under subsection 672.02(1) or an assessment admitted as evidence under section 672.06 forms part of the record of the case in respect of which it was ordered or admitted.

Disclosure by qualified person

672.08 Despite any other provision of this Act, a qualified person who is of the opinion that an accused held in detention or remanded to custody is likely to endanger his or her own life or safety or to endanger the life of, or cause bodily harm to, another person may immediately so advise any person who has the care and custody of the

Garde aux fins d'évaluation

672.04 (1) Sous réserve du paragraphe (2) et de l'article 672.05, le tribunal peut, pour les besoins de l'évaluation visée à l'article 672.02, renvoyer l'accusé sous garde pour une période maximale de trente jours.

Motifs du renvoi

(2) L'accusé ne peut être renvoyé sous garde en conformité avec une ordonnance visée au paragraphe (1) que dans les cas suivants :

a) le tribunal est convaincu que, compte tenu des éléments de preuve présentés, la détention de l'accusé est nécessaire pour mener l'évaluation;

b) l'accusé doit être détenu pour une autre raison ou en vertu d'une autre disposition de la présente loi.

Rapport écrit

(3) Pour l'application de l'alinéa (2)a), le témoignage de la personne compétente peut, si le poursuivant et l'accusé y consentent, être présenté sous la forme d'un rapport écrit.

Demande de modification de l'ordonnance

672.05 Lorsque la nécessité lui en est démontrée, le tribunal peut, pendant que l'ordonnance rendue en vertu du paragraphe 672.02(1) est en cours de validité, modifier les modalités de celle-ci de la façon qu'il juge indiquée dans les circonstances.

Évaluation non ordonnée par le tribunal

672.06 L'évaluation faite par une personne compétente afin d'établir si l'accusé est atteint de troubles causés par l'alcoolisation foetale peut être admise en preuve aux fins visées aux alinéas 672.02(2)a) à d), même si elle n'a pas été faite par suite d'une ordonnance rendue en vertu du paragraphe 672.02(1).

Inclusion du rapport dans le dossier

672.07 Le rapport de l'évaluation menée en vertu du paragraphe 672.02(1) ou l'évaluation admise en preuve au titre de l'article 672.06 sont versés au dossier de l'affaire pour laquelle l'évaluation a été ordonnée ou admise en preuve.

Communication de renseignements par la personne compétente

672.08 Malgré les autres dispositions de la présente loi, la personne compétente, si elle estime que l'accusé en détention ou renvoyé sous garde est susceptible d'attenter à sa vie ou à sa sécurité ou d'attenter à la vie d'un tiers ou de lui causer des lésions corporelles, peut en aviser toute personne qui assume les soins et la garde de celui-ci, que

accused whether or not the same information is contained in a report made following an assessment under subsection 672.02(1).

Period order is in force

672.09 (1) An assessment order made under subsection 672.02(1) shall not be in force for more than 30 days, unless a court is satisfied that compelling circumstances exist that warrant a longer period.

Extension

(2) Subject to subsection (3), a court may extend an assessment order, on its own motion or on the application of the accused or the prosecutor made during or at the end of the period during which the order is in force, for any further period that is required, in its opinion, to complete the assessment of the accused.

Maximum duration of extension

(3) No extension of an assessment order shall exceed 30 days, and the period of the initial order together with all extensions shall not exceed 60 days.

3 The Act is amended by adding the following after section 718.2:

Presumption

718.201 Evidence that an offender suffers from a fetal alcohol disorder shall be deemed to be a mitigating factor if the disorder impairs the offender's ability

(a) to make judgments;

(b) to foresee and understand the consequences or risks of his or her actions; or

(c) to control impulse behaviour.

4 Section 731 of the Act is amended by adding the following after subsection (2):

External support plan

(3) Where an offender has been determined to suffer from a fetal alcohol disorder following an assessment referred to in section 672.02, the court shall prescribe, as a condition of the probation order, that the offender comply with an external support plan established for him or her by a probation officer that includes any components that the probation officer considers necessary to ensure that the offender has the necessary support to facilitate his or her successful reintegration into society.

ce renseignement figure ou non au rapport de l'évaluation menée en vertu du paragraphe 672.02(1).

Période de validité

672.09 (1) Une ordonnance d'évaluation rendue en vertu du paragraphe 672.02(1) ne peut être en vigueur durant plus de trente jours, sauf si le tribunal est convaincu que des circonstances exceptionnelles exigent une période de validité plus longue.

Prolongation

(2) Sous réserve du paragraphe (3), le tribunal peut, d'office ou à la demande de l'accusé ou du poursuivant présentée pendant que l'ordonnance est en cours de validité ou à la fin de sa période de validité, prolonger l'ordonnance d'évaluation pour la période qu'il juge nécessaire pour que soit menée à terme l'évaluation de l'accusé.

Durée maximale des prolongations

(3) Une prolongation de l'ordonnance d'évaluation ne peut dépasser trente jours et l'ensemble de l'ordonnance et de ses prolongations, soixante jours.

3 La même loi est modifiée par adjonction, après l'article 718.2, de ce qui suit :

Présomption

718.201 Le fait que le délinquant est atteint de troubles causés par l'alcoolisation foetale est considéré comme une circonstance atténuante si ces troubles portent atteinte à sa capacité, selon le cas :

a) d'exercer un bon jugement;

b) de prévoir ou de comprendre les conséquences de ses actions ou les risques qu'elles posent;

c) de maîtriser son impulsivité.

4 L'article 731 de la même loi est modifié par adjonction, après le paragraphe (2), de ce qui suit :

Plan de soutien externe

(3) Dans le cas d'un délinquant déclaré atteint de troubles causés par l'alcoolisation foetale au terme d'une évaluation visée à l'article 672.02, le tribunal ajoute aux conditions de l'ordonnance de probation l'obligation pour le délinquant de se conformer à un plan de soutien externe établi pour lui par un agent de probation et comportant les éléments que ce dernier estime nécessaires pour favoriser la réussite de la réinsertion sociale du délinquant.

1992, c. 20

Corrections and Conditional Release Act

5 Subsection 2(1) of the *Corrections and Conditional Release Act* is amended by adding the following in alphabetical order:

fetal alcohol disorder has the same meaning as in section 2 of the *Criminal Code*. (*troubles causés par l'alcoolisation foetale*)

6 Paragraph 4(g) of the Act is replaced by the following:

(g) correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care, persons suffering from a fetal alcohol disorder or other disability and other groups;

7 Section 77 of the Act is renumbered as subsection 77(1) and is amended by adding the following:

Other programs

(2) The Service shall also provide programs designed particularly to address the special requirements or limitations of persons requiring mental health care and persons suffering from a fetal alcohol disorder.

8 Subsection 151(3) of the Act is replaced by the following:

Respect for diversity

(3) Policies adopted under paragraph (2)(a) must respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements or limitations, including persons requiring mental health care and persons suffering from a fetal alcohol disorder.

1992, ch. 20

Loi sur le système correctionnel et la mise en liberté sous condition

5 Le paragraphe 2(1) de la *Loi sur le système correctionnel et la mise en liberté sous condition* est modifié par adjonction, selon l'ordre alphabétique, de ce qui suit :

troubles causés par l'alcoolisation foetale S'entend au sens de l'article 2 du *Code criminel*. (*fetal alcohol disorder*)

6 L'alinéa 4g) de la même loi est remplacé par ce qui suit :

g) ses directives d'orientation générale, programmes et pratiques respectent les différences ethniques, culturelles et linguistiques, ainsi qu'entre les sexes, et tiennent compte des besoins propres aux femmes, aux autochtones, aux personnes nécessitant des soins de santé mentale, aux personnes atteintes de troubles causés par l'alcoolisation foetale ou d'une autre déficience et à d'autres groupes;

7 L'article 77 de la même loi devient le paragraphe 77(1) et est modifié par adjonction de ce qui suit :

Autres programmes

(2) Il doit également fournir des programmes adaptés aux besoins particuliers ou aux limitations des personnes nécessitant des soins de santé mentale et de celles atteintes de troubles causés par l'alcoolisation foetale.

8. Le paragraphe 151(3) de la même loi est remplacé par ce qui suit :

Directives égalitaires

(3) Les directives établies en vertu du paragraphe (2) doivent respecter les différences ethniques, culturelles et linguistiques, ainsi qu'entre les sexes, et tenir compte des besoins propres aux femmes, aux autochtones et à d'autres groupes ayant des besoins particuliers ou des limitations, notamment les personnes nécessitant des soins de santé mentale et celles atteintes de troubles causés par l'alcoolisation foetale.

Department of Justice Canada | Ministère de la Justice Canada

s.21(1)(a)
s.21(1)(b)
s.23

FOR INFORMATION
NUMERO DU DOSSIER/FILE #: 2016-005109
COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: Protected B

TITRE/TITLE: ***Edgar Schmidt v The Attorney General of Canada***

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- [redacted]

Soumis par (secteur)/Submitted by (Sector): National Litigation Sector

Responsable dans l'équipe du SM/Lead in the DM Team: Claudine Patry

Revue dans l'ULM par/Edited in the MLU by: Matt Ignatowicz

Soumis au CM/Submitted to MO: March 14, 2016

Department of Justice Canada | Ministère de la Justice Canada

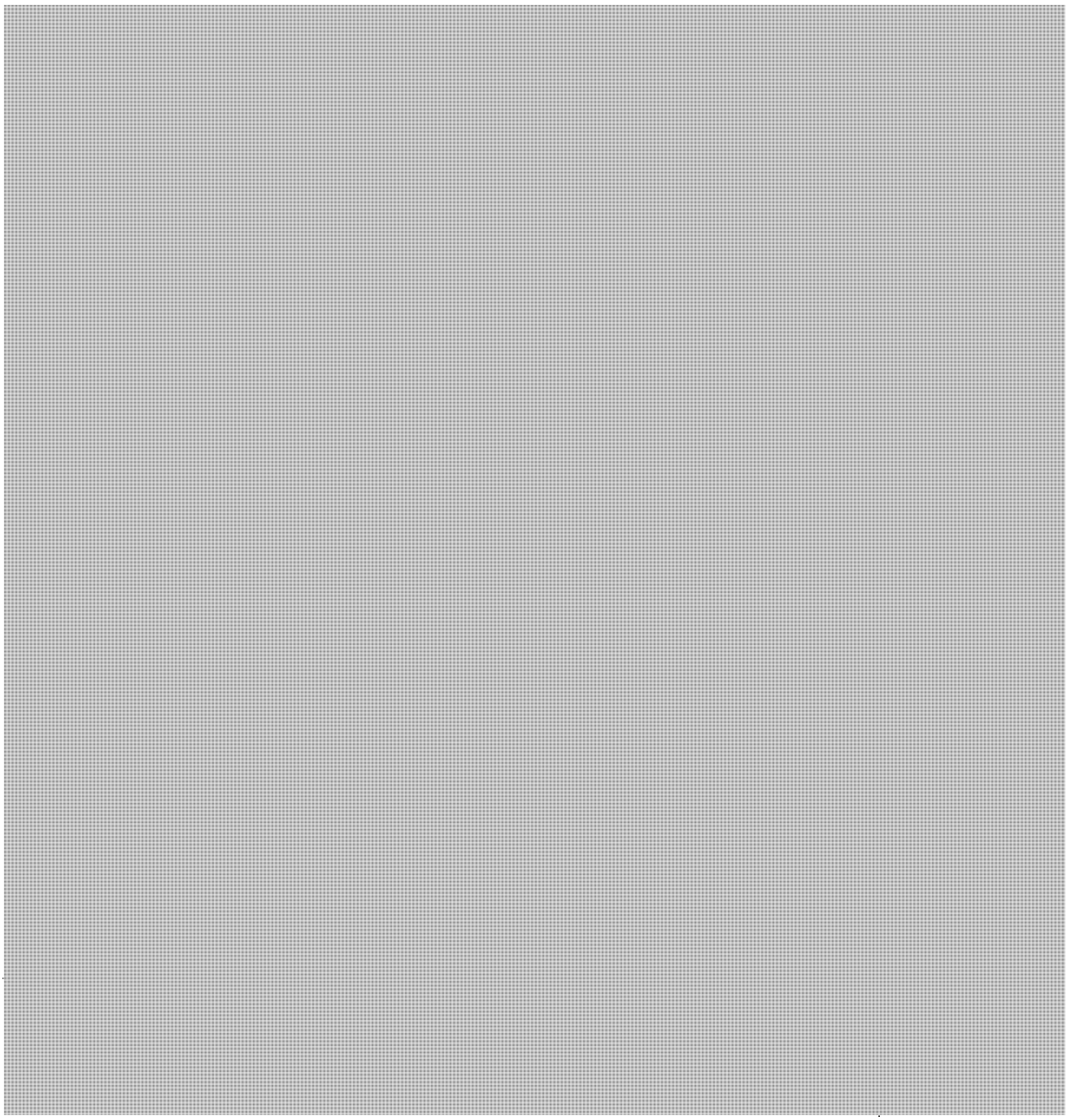
s.21(1)(a)
s.21(1)(b)
s.23

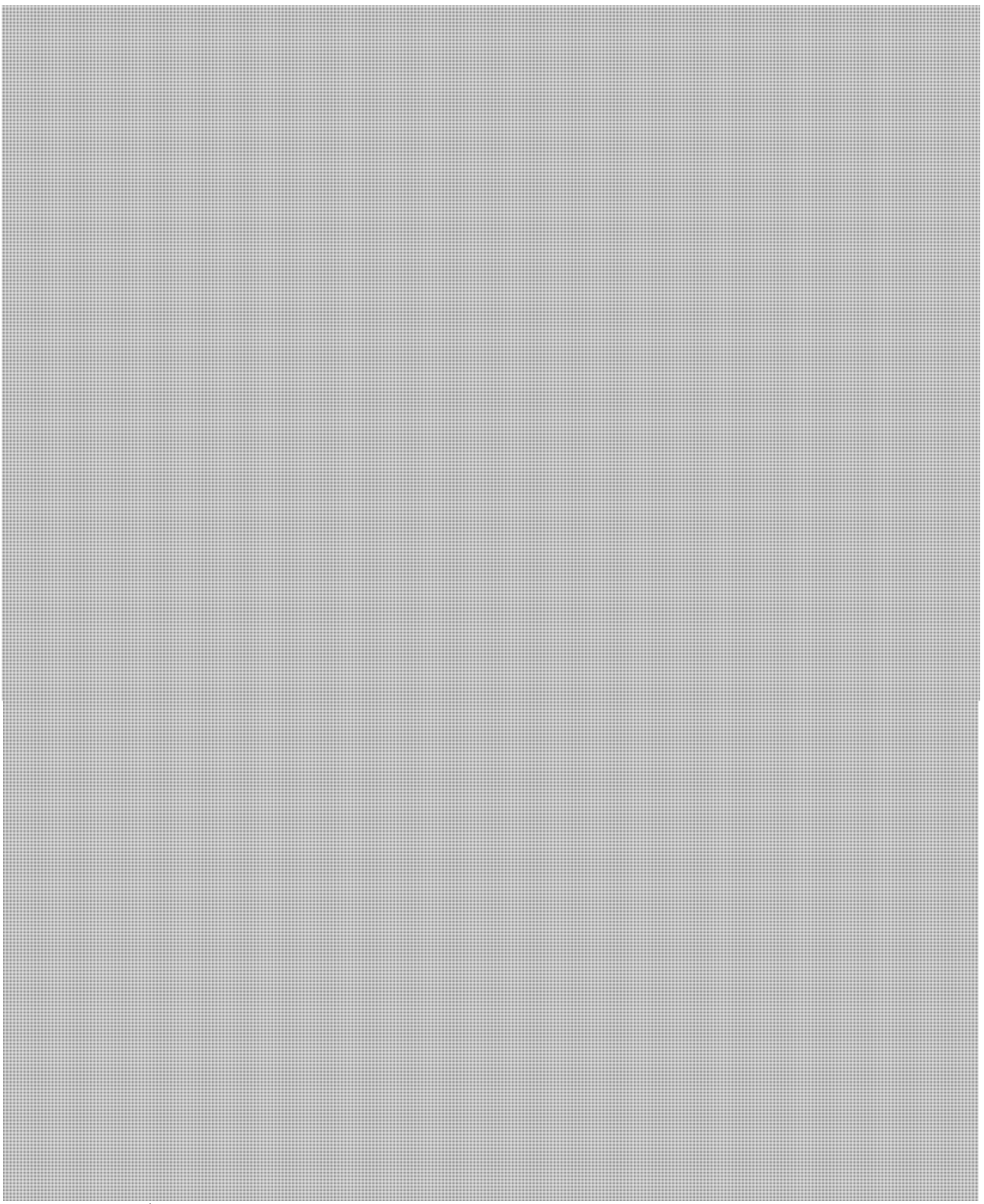
Protected B
FOR INFORMATION

2016-005109

MEMORANDUM FOR THE MINISTER

Edgar Schmidt v The Attorney General of Canada





s.21(1)(a)
s.21(1)(b)
s.23

[redacted]

ANNEX 1: Decision - *Schmidt v. AGC*, 2016 FC 269

s.21(1)(a)
s.21(1)(b)
s.23

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Federal Court | Cour fédérale

Date: 20160302

Docket: T-2225-12

Citation: 2016 FC 269

Ottawa, Ontario, March 2, 2016

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

EDGAR SCHMIDT

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervenor

JUDGMENT AND REASONS

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I. OVERVIEW

[1] In this simplified action, Mr. Schmidt, the Plaintiff, submits that the Minister of Justice and the Clerk of the Privy Council do not correctly assume their examination and reporting duties pursuant to section 3 of the *Bill of Rights*, section 4.1 of the *Department of Justice Act*, and subsections 3(2) and 3(3) of the *Statutory Instruments Act* when reviewing bills and draft regulations in order to determine whether or not some of their provisions breach guaranteed rights protected by the *Canadian Bill of Rights* and the *Charter of Rights and Freedoms*. The Minister of Justice is responsible in regards to bills and some regulations, whereas the Clerk of the Privy Council in collaboration with the Deputy Minister of Justice is responsible for all other draft regulations.

[2] Mr. Schmidt submits that rather than applying the so-called "credible argument" standard, the "more likely than not inconsistent" standard should apply. For the reasons that follow, I come to a different conclusion. By interpreting the relevant statutes, I find that the "credible argument" standard applies. In reaching that conclusion, I will utilize the following interpretive tools: the plain meaning approach, the legislator's intent, and the constitutional and institutional contexts. The declarations sought by Mr. Schmidt will not be made as it is the opinion of this Court that the arguments supporting the Defendant's position prevail.

II. INTRODUCTION

A. Introduction

[3] Pursuant to section 3 of the *Canadian Bill of Rights*, SC 1960, c 44 [the *Bill of Rights*]; section 4.1 of the *Department of Justice Act*, RSC 1985, c J-2, and subsections 3(2) and 3(3) of the *Statutory Instruments Act*, RSC 1985, c S-22, the Minister of Justice must ascertain whether proposed legislation and regulations are inconsistent with the *Canadian Charter of Rights and Freedoms* (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11) [the *Charter*] and the *Canadian Bill of Rights*. If the Minister of Justice ascertains that an inconsistency with guaranteed rights does indeed exist, she must file a report to the House of Commons indicating her conclusion. In regards to most regulations, it is the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, who will ascertain whether an inconsistency with guaranteed rights exists. If indeed they opine that an inconsistency in regards to regulations is present, they will report their conclusion to the regulation-making authority.

[4] The statutory provisions that create these examination and reporting obligations, taken together, are referred to as the "examination provisions". The Minister's duty to examine proposed legislation and the subsequent reporting duty are triggered following the internal draft legislation development processes within the Department of Justice in conjunction with the client (who is the responsible department under the legislation).

[5] The legal issue at hand is whether the standard of compliance mandated by the examination provisions is met by the existence of:

1. An argument that is credible, *bona fide*, and capable of being successfully argued before the courts, known as the "credible argument" standard; or

2. An argument that is more likely than not inconsistent with guaranteed rights, known as the "more likely than not inconsistent" standard.

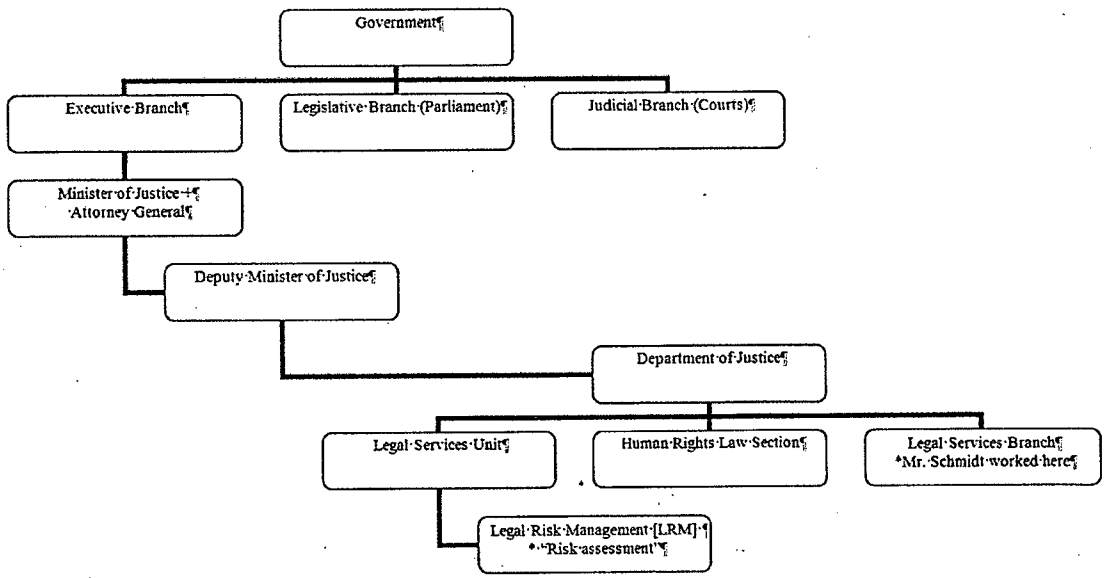
[6] The Defendant, the Attorney General of Canada, essentially represents the Minister of Justice who interprets the examination provisions to require the application of the "credible argument" standard in order to ascertain whether the Minister's duty to file a report is triggered. The Minister of Justice currently defines the "credible argument" as an argument that is credible, made in good faith, and capable of being successfully argued before the courts.

[7] The Plaintiff, Mr. Schmidt, argues that the Minister of Justice's interpretation of the examination provisions is illegal. He argues that the correct interpretation of the examination provisions yields the stricter of the two standards, which he interprets as the "more likely than not inconsistent with guaranteed rights" standard. The Plaintiff concludes that the departmental interpretation of the examination provisions is contrary to their grammatical and ordinary sense; is inconsistent with their entire context; frustrates the purposes of the provisions instead of fostering them; does not fit with the scheme of the relevant legislation; and does not respect the requirements of the rule of law.

[8] In response, the Defendant brings forward the following general arguments: the House of Commons has never expressed dissatisfaction with the application of the "credible argument" threshold; Parliament confirmed it wants the Minister to continue to play her political and statutory roles, not become a judge ruling on the validity of proposed legislation; the "credible argument" standard is proper as it allows the Executive to propose policy development, even proposals that may attract legal risk short of clear unconstitutionality; the "credible argument" standard reflects Parliament's intent to allow each branch of government to perform its appropriate role in ensuring guaranteed rights are respected; and the rule of law functions in symbiosis with other constitutional principles, namely democracy and the separation of powers.

B. Roles and Duties

[9] One difficulty we face in this case lies in situating the legal issue within the wide framework of government. The following graph is a simplified visual representation of the institutional framework relevant to this case:



[10] In order to coherently approach the legal issue at play, I will first describe the three branches of government, namely the Executive, Parliament, and the Judiciary. But beforehand, I would like to insert two caveats: first, I will not pretend to fully describe the inner workings of government in their full complexity; the parties, through the voluminous evidence filed and through cross-examination, have provided a much fuller and more nuanced portrait. Second, the evidence filed has been redacted in order to properly protect solicitor-client privilege. This Court does not have access to practical examples of the actualization of the examination and reporting duties. As such, the role of the Court is limited to determining the acceptability of the framework created by the examination provisions; the Court's role does not entail determining the acceptability of any specific actions taken by the Minister of Justice.

[11] For the purposes of the present reasons, I will limit my descriptions to what I consider essential. To do so, I have gleaned information from:

1. The *Statement of Agreed Facts* submitted by the parties;

2. The affidavit and cross-examination of Deputy Minister of Justice William Pentney;

3. The affidavit and cross-examination of Principal Analyst with the Parliamentary Information and Research Service of the Library of Parliament of Canada John Stilborn;

4. The affidavit and cross-examination of Corporate counsel with the Department of Justice of Canada Deborah MacNair;

5. The affidavit and cross-examination of Former employee in the Human Rights Law Section of the Department of Justice of Canada Martin Low;

6. The affidavit and cross-examination of Former Director and General Counsel of the Legal Risk Division and current Director and General Counsel of the Law Practice Management Division at the Department of Justice of Canada Patrick Vézina; and

7. The affidavit and cross-examination of Former Chief Legislative Counsel and Assistant Deputy Minister of the Department of Justice's Legislative Services Branch John Mark Keyes.

[12] The Executive is responsible for leading the day-to-day operations of the Government of Canada. It also develops policies that will eventually be crafted into bills. The Executive is composed of members from the elected political party in power. As the legislative branch of government, Parliament debates proposed legislation and eventually votes; determining whether or not bills will become laws. Parliament includes entities such as the House of Commons and the Senate, and their sometimes lesser-known subdivisions such as various committees, the Library of Parliament, and the Office of the Speaker, among others. The Judiciary examines laws for consistency with guaranteed rights and interprets legislation. The Judiciary is composed of judges and prothonotaries who are appointed by the Executive.

[13] Within the Executive branch, we find Cabinet, the entity that regroups the highest-ranking members of the elected government in power. The Prime Minister appoints Members of Parliament to the head of a certain ministry, making them ministers. For our purposes, only the Minister of Justice is relevant. The Minister of Justice is the Minister responsible for providing legal advice to Cabinet. The Minister of Justice is focused on advising policy officials across government on how to achieve their policy objectives while respecting the Constitution, the

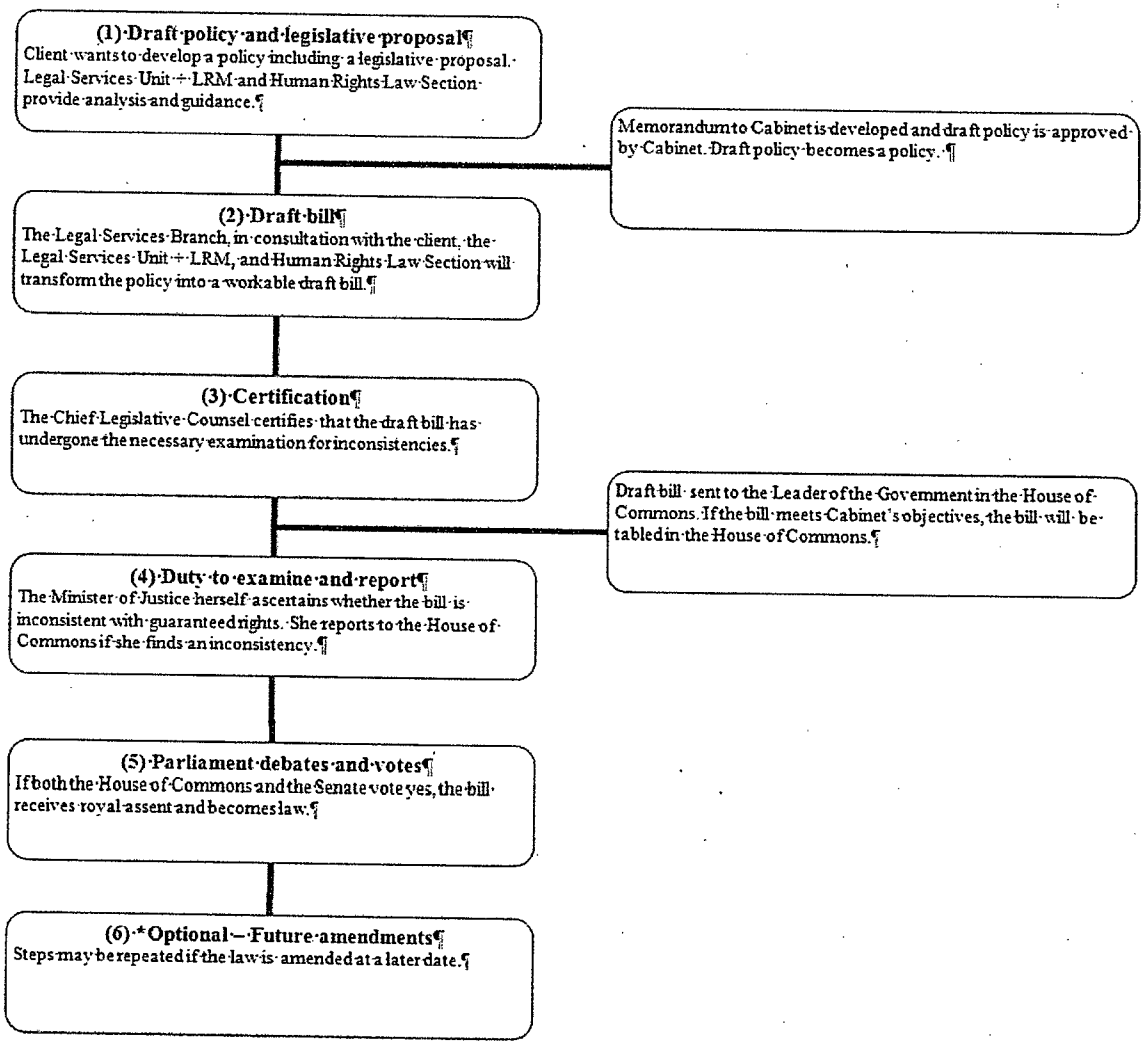
Charter, and other legal rules. The Minister of Justice, as a single person, cannot properly provide legal advice to Cabinet. To perform her duties fully, the Minister of Justice delegates parts of her responsibility to the Department of Justice. Therefore, the Department of Justice is an extension of the Minister of Justice which helps her fulfil her role. In a sense, the Department of Justice is a law firm that provides legal advice to the other ministries who are the clients. The person who is Minister of Justice in fact holds two major roles at once: that of the Minister of Justice, as the legal counsel to the Executive, and that of the Attorney General, as the federal government's lawyer in all litigation. The Attorney General represents the legal position of the Executive in all litigation involving the federal government.

[14] The Minister of Justice further delegates her responsibilities. Notably, the Minister of Justice delegates the responsibility of managing the day-to-day operations of the Department of Justice to the Deputy Minister of Justice. In such capacity, the Deputy Minister of Justice may, for example, issue directives to Department of Justice staff. For the purposes of the case at hand, three of the many subdivisions of the Department of Justice are relevant: the Legal Services Unit, the Human Rights Law Section, and the Legal Services Branch. First, the Legal Services Unit assists various departmental clients in identifying legal issues, notably those involving the *Charter*. The Legal Services Unit, under its Legal Risk Management branch [LRM], creates frameworks which other bodies use to discuss and analyze legal risk. Second, the Human Rights Law Section provides advice when a risk of an inconsistency with guaranteed rights has been identified by the Legal Services Unit. The Human Rights Law Section advises on risk of infringement and the likelihood of successfully defending a legal challenge. Third, the Legal Services Branch is specialized in drafting legislation and examining draft bills for consistency

with guaranteed rights. The Plaintiff, Mr. Schmidt, worked as legislative counsel within the Legal Services Branch.

C. Process

[15] In order to understand this case, it is important to fully grasp the detailed process by which political objectives become law. The following section breaks down that process into six major steps. They are: (1) formulating a draft policy and a legislative proposal; (2) drafting the bill; (3) certifying the draft bill; (4) determining if the Minister's duty to report is triggered; (5) debating and voting on the bill in Parliament, followed by royal assent; and (6) an optional review step if the law is amended in the future. Witnesses have specified at trial that such an optional step has never been put into practice although it exists in theory. Each step is further broken down into its smaller parts and processes. For the sake of logical coherence, there will be some repetition as to the roles and duties expressed above. The specific process as to regulations is also omitted in the graph below but will be summarily detailed further down. The following graph is a simple representation of the process an idea undergoes to become a law.



Step (1) -- Developing a Draft Policy and a Legislative Proposal

[16] The process of creating a law begins with an idea, typically from a member of the Executive. This member of the Executive will seek legal advice from the Minister of Justice in order realize his or her project. The Minister of Justice delegates this responsibility to give legal advice to the Department of Justice. The member of the Executive mandating the Department of Justice with transforming that idea into a policy and eventually into a draft bill is known as the departmental client.

[17] For this step, two previously mentioned sections of the Department of Justice are particularly relevant: the Legal Services Unit and the Human Rights Law Section. In consultation with all relevant parties, a draft policy will be developed which will serve to guide the elaboration of a legislative proposal. A legislative proposal details the parameters the Legal Services Branch must follow to transform the policy into a draft bill. The legislative proposal is not a draft bill in proper form; it is rather the roadmap detailing what a bill will entail. The departments will consult with each other and revise the policy and the legislative proposal according to all the feedback provided.

a) *Legal Risk Management as a Function of the Legal Services Unit*

[18] To develop a draft policy and a legislative proposal, the Legal Services Unit assists various clients in identifying legal issues, notably those involving *Charter* rights. To do so, the Legal Services Unit develops and applies the concept of Legal Risk Management.

[19] Legal Risk Management is an englobing concept that aims to aggregate different types of legal risk in order to guide decision-making. Other branches of the Department of Justice use the LRM framework to perform their own legal analyses. The "Risk" portion of "Legal Risk Management" only refers to "risk to government operations". It does not command the analysis of "risk to the state as a whole" or "risk to the public" because the client is a government department. This reflects the role of the Department of Justice as a "law firm" - type entity: principles such as solicitor-client relationship apply. LRM assesses issues such as the division of powers, administrative law, and guaranteed rights under the *Charter* and the *Bill of Rights*. LRM applies when the Department of Justice is mandated to draft a bill, but no longer applies once the

bill is before the Legislative Branch (Parliament) for consideration. The LRM policy does not dictate what Ministers (Members of Cabinet) can and cannot do; it only addresses how Department of Justice counsel advising the Minister of Justice must accomplish their duties. For example, LRM frameworks propose standardized vocabulary and various scales to describe risks.

[20] When a LRM analysis is performed, a policy is analyzed on two fronts in order to ascertain its overall legal risk. The first front is the risk of a negative outcome following a hypothetical court challenge. The second front is the impact of that negative outcome on government. The "impact" factor considers solely impacts on "government operations", not on "the state as a whole" nor "in the public interest". Factors influencing the "impact" analysis are, for example, administrative impact, reputational impact, financial impact, legal impact and so on. Once the legal risk level has been determined, the legal risk evaluation is communicated to the client and the Legal Services Unit will suggest options to alleviate the legal risks identified. After that, the client department will be in position to decide what it wants to do about that legal risk. Risk tolerance or risk aversion of the client is thus obviously an important factor.

[21] If the LRM analysis determines a bill to be fully unacceptable or illegal, in this situation, a formal LRM risk evaluation will not be given to the client as the situation will be outside the scope of a formal LRM risk evaluation. Rather, the Legal Services Unit will refuse to evaluate and will instead advise not to follow that course of action. If the client ministry does not agree and wants to proceed regardless, it is the Legal Services Unit's policy to "Brief Up", meaning to raise the issue to upper management. "Briefing Up" is performed under the duty of counsel

working for the Legal Services Unit, not under the performance of a LRM Risk Evaluation. Ultimately, it is still up to the client to decide whether it will pursue development of the policy, but the effect of "Briefing Up" is that senior representatives of the Department of Justice will have discussions with senior representatives of the departmental client.

b) *The Role of the Human Rights Law Section*

[22] The second relevant section of the Department of Justice at the policy and legislative proposal development stage is the Human Rights Law Section. The Human Rights Law Section is a specialized section which deals exclusively with human rights issues and *Charter* analysis. If the Legal Services Unit identifies potential inconsistencies in regards to guaranteed rights, it will consult the Human Rights Law Section in order to obtain its specialized advice.

c) *Preparing the Memorandum to Cabinet*

[23] Following the multiple cycles of feedback from the relevant parties, the draft policy and the legislative proposal are inserted into a wider document called a Memorandum to Cabinet. A Memorandum to Cabinet is a document addressed to Cabinet from the client Minister, which contains all the information necessary for Cabinet to discuss and debate the merits of following through with an idea. It contains multiple types of opinions: financial, political, legal, etc. Cabinet may approve the Memorandum, propose amendments, or refuse to usher the project any further.

Step (2) -- Drafting the Bill

[24] Assuming the Memorandum to Cabinet is approved, the instructions within the legislative proposal are forwarded to the Legal Services Branch of the Department of Justice in order to be transformed into a draft bill. Similar steps to the development of a draft policy (Step 1) are repeated in order to draft a bill. Notably, all the parties involved will provide feedback, analyze the project for inconsistencies with guaranteed rights, and consult each other. If necessary, Cabinet may be asked to approve another Memorandum to Cabinet reflecting various opinions and amendments related to the project. It is important not to confuse the Legal Services Branch, which is primarily tasked with legal drafting, with the Legal Services Unit, whose role is fleshed-out in the preceding section. Their names are in part similar but their roles are not. Ultimately, the Legal Services Branch will obtain input and go back and forth with the client, the Legal Services Unit and the Human Rights Law Section, managing and analyzing risks, until the project is completed. This step will transform the policy into a draft bill.

Step (3) -- Certification of the Draft Bill or Draft Regulation

[25] Once a draft bill or draft regulation has been drafted and is in its final form, it must undergo what is known as "certification". "Certification" is a procedure by which a draft bill or regulation is checked by senior staff of the Legal Services Branch to confirm that the necessary examinations, such as the system of back and forth between branches of the Department of Justice, have been performed. "Certification", when completed, communicates to the Legislative

Branch (Parliament) that the necessary examinations have been performed when it receives the draft bill or regulation.

[26] A key attribute of "certification" is that the resulting communication confirms to Parliament whether or not the examination has taken place. It does not communicate what the examination is based on and does not communicate what analyses were performed and considered in order to reach the conclusion that the draft bill could indeed be certified.

[27] The individual tasked with signing-off on the certification process does not communicate the reasons of his decision to certify or not to anyone but the Minister of Justice. The examination provisions do not require any other entity except for the Minister of Justice to consider the outcome of the assessment. The process of certification is different for draft bills than for draft regulations. The following sections outline the differences in both processes.

a) *Certification of Bills*

[28] First, in regards to the certification of bills, a "legislative drafting counsel" or "drafter", working in the Legal Services Branch, provides a memo containing an analysis as to the consistency with guaranteed rights of the draft provisions to the Chief Legislative Counsel.

[29] Second, the Chief Legislative Counsel is the head of the Legal Services Branch. The role of the Chief Legislative Counsel emanates from the Minister of Justice delegating her responsibility as Chief Law Officer of the Crown to certify draft bills to the Deputy Minister of Justice, who in turns delegates this responsibility to the Chief Legislative Counsel. The task of

the Chief Legislative Counsel, once he or she receives the memo containing the opinion of the drafter, is to certify that the proposed legislation has been properly reviewed for consistency with guaranteed rights.

[30] Third, at this point, it is important to specify that the certification process, which is a specific step in the life of a draft bill, is not the same thing as the risk assessment process, which happens before certification, as the policy and drafting processes are ongoing. The risk assessment, contrary to certification, is a more fluid and general concept part of the Legal Risk Management framework. Legal Risk Management and risk assessments are performed within the Department of Justice, whereas certification is a duty of the Minister of Justice herself (of which she has delegated the performance to the Chief Legislative Counsel). Certification reflects a statutory obligation of the Minister of Justice to inform the Legislative Branch (Parliament) of the finality of the certification process. It is a separate and distinct obligation from the Minister of Justice's duty to counsel Cabinet.

b) *Certification of Regulations*

[31] As for the certification of regulations, a drafter (i.e. legislative drafting counsel) within the Legal Services Branch certifies that a draft regulation has been examined. This process, for regulations, is known as blue-stamping; regulations do not require the approval of the Chief Legislative Counsel. Proposed regulations are generally pre-published in the *Canada Gazette* before they are presented to the regulation-making authority for adoption. The purpose of pre-publication is to give members of the public who are interested in reviewing draft regulations an

opportunity to do so. As is the case with counsel from the Legislative Services Branch who draft bills, counsel who draft regulations will also consult other departments such as the Human Rights Law Section. Furthermore, once regulations are enacted, the Standing Joint Committee for the Scrutiny of Regulations may review them. A "joint" committee is composed of members from both the House of Commons and the Senate.

Step (4) -- The Duty to Report

a) *Duty to Report Regarding Bills*

[32] After a draft bill has been certified, it is forwarded to the Leader of the Government in the House of Commons. If he or she determines that the proposed legislation meets Cabinet's requirements, the draft bill will be tabled, meaning introduced, into the House of Commons. Once the draft bill is tabled in the House of Commons, which is part of the Legislative Branch (Parliament), the draft bill is no longer a "draft bill", but rather simply a "bill".

[33] Tabling the draft bill triggers the Minister of Justice's personal duty to report to Parliament. The duty to report, as per the examination provisions, calls for the Minister of Justice herself to ascertain whether the tabled bill is inconsistent with guaranteed rights. Contrary to certification, the duty to report of the Minister of Justice cannot be delegated; it is a personal duty of the Minister of Justice. The duty to report to Parliament is statutory and fulfilled by the Minister of Justice in her capacity as a member of the Executive. Parliament benefits from a report but is not the client of the Minister of Justice.

[34] If the Minister of Justice ascertains that a bill is inconsistent with guaranteed rights, she must table a report in the House of Commons stating her conclusion. In order to reach a conclusion, the Minister of Justice considers multiple factors, notably those of political and legal nature. The analysis and outcome of the opinion provided by a legal drafter to the Chief Legislative Counsel during the certification process most likely influences whether the reporting obligation is triggered or not. Yet, it is but one factor among others the Minister of Justice will consider when ascertaining whether the bill is inconsistent with guaranteed rights or not. The Minister is not bound by any opinion held by other parties.

[35] If the Minister does indeed table a report, the report will not be legal advice to Parliament but rather a simple communication warranted by statute. The content of such a report would be precise, narrow, and would bluntly state that the Minister of Justice has ascertained that some provisions are inconsistent with guaranteed rights. The examination provisions do not oblige the Minister of Justice to provide context or content to the expression of her opinion as to whether the bill is inconsistent with guaranteed rights or not. Put simply, the examination provisions do not ask for a substantial report; they simply ask for a report on the existence of an inconsistency. That question is answerable with yes or no.

[36] It is worth noting that the mechanism of the duty to report is not the only way by which the expertise of the Department of Justice may be disseminated. If called upon to do so, during Parliament's review of the proposed legislation, the Department of Justice will appear, through representatives, in committees and present other types of opinions which are more substantial. The Department of Justice may also be called upon to comment on any amendments being

discussed. If indeed Cabinet intends to amend the bill, it will be reviewed internally by the different units of the Department of Justice.

b) *Duty to Report Regarding Regulations*

[37] In regards to regulations, following certification by a legal drafter (blue-stamping), it is the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, who will ascertain whether an inconsistency with guaranteed rights exists. If indeed they opine that an inconsistency is present, they will report their conclusion to the regulation-making authority. The considerations linked to the content and trigger point of the duty to report in regards to regulations are otherwise the same as with bills.

Step (5) -- Bill is debated in Parliament and Royal Assent

[38] The penultimate step in the life of a bill, once tabled into Parliament, is to be scrutinized, debated, and voted upon by both the House of Commons and the Senate. Typically, a bill will undergo three readings in the House of Commons, may be referred to a committee for in depth analysis, be amended, and finally voted on. These steps will be repeated as necessary in the Senate. If the Senate proposes amendments, the bill will be sent back to the House of Commons and the process will begin anew until both Chambers vote yes on an identical version of the bill. Ultimately, the bill will receive the Head of State's royal assent, also known as the Governor's General approval (representing the Queen), and become law.

Step (6) -- Optional – Future Amendments

[39] Deputy Minister of Justice William Pentney, during cross-examination, specified that the LRM risk assessment process might continue if amendments are proposed when the bill is before the Legislative Branch (Parliament). To date, the certification process has never been repeated when amendments to a bill have been proposed. However, Deputy Minister Pentney, again in cross-examination, has indicated that the Department of Justice continues to analyze and determine whether proposed amendments would give rise to an opinion of inconsistency with regard to guaranteed rights. Such a situation has never arisen but Deputy Minister Pentney indicated there have been instances that came close.

D. Arguments

Part (1) -- Standard of Review

[40] Although this case has not been directly called a judicial review but rather a simplified action, in essence the Court is asked to review the interpretation the Department of Justice applies to the examination provisions. As such, the Court needs to determine upon which standard to consider the Minister's interpretation of the examination provisions.

[41] The Plaintiff submits that the standard of review is correctness. The Plaintiff supports this argument by suggesting that the examination provisions are interpreted by the Minister not as an adjudicator but as an administrator of the law. The Plaintiff further argues that the application of law calls for correctness because Parliament did not intend to give deference to the Minister

when interpreting provisions that have to do with fundamental constitutional and institutional issues. It is the Plaintiff's position that the examination provisions are a core component of the rule of law, and therefore should be interpreted strictly. To not interpret the provisions this way would undermine the rule of law.

[42] The Defendant counters that the Minister's interpretation of the examination provisions must be evaluated on the standard of "appropriateness". "Appropriateness" has never been proposed before as a standard by which a Court may consider review; it appears to be a novel proposition never dealt with by jurisprudence. The Defendant did not thoroughly define "appropriateness".

[43] This debate between the parties amounts to a non-issue as they are essentially arguing for the same standard, and that is correctness. "Appropriateness", as summarily proposed by the Defendant, is so similar to correctness, which is widely accepted in jurisprudence, that the debate is moot. The correctness standard of review will apply to the present reasons.

Part (2) -- Justiciability

[44] It is important to note that the Court is only asked to interpret the examination provisions in order to determine what the correct standard is. The Court is not asked to review specific acts of the Minister of Justice in application of that standard. To do so would be inappropriate, as no specific facts have been provided to the Court and such an analysis would most likely impede ministerial discretion and solicitor-client privilege.

Part (3) -- Appropriate Standard Debate and Summary of the Parties Arguments

[45] The Plaintiff's overarching goal is to establish the inadequacy of the current interpretation by demonstrating that the true purpose of the examination provisions is to ensure the Executive only introduces bills into Parliament which are more likely than not consistent with guaranteed rights. The Plaintiff attempts to establish that the current framework in which the examination and reporting duties are actualized permits fundamental breaches to the rule of law and needs to be declared unlawful.

[46] The Plaintiff submits that the "credible argument" standard currently applied is inadequate, as consistency with guaranteed rights must be attained. A credible argument that is not likely to be accepted by the Courts is never capable of ensuring compliance with guaranteed rights. When faced with a credible argument and a shortage of jurisprudence against which to weigh the acceptability of that argument, the Plaintiff submits that the "credible argument" standard remains inappropriate.

[47] Rather the Plaintiff suggests that an argument made in a field of sparse jurisprudence against which to weigh its value should be treated more leniently and thus more easily concluded "more likely than not consistent" with guaranteed rights. The practical result of this logic is that the zone of acceptability for arguments weighted against the "more likely than not inconsistent" standard expands if there is little material or precedent against which to analyze the proposed legislation, not that the "credible argument" standard is ever acceptable.

[48] The Defendant's overarching goal is to establish that the current interpretation of the examination provisions is correct by demonstrating that the purpose of the provisions is to deter inconsistent legislation from ever being developed in the first place and that such a mechanism is effective and respects separation of powers. The Defendant, through evidence filed, aims to convince the Court that the deterring effect of the examination provisions against inconsistent legislation is effective and respects the roles and responsibilities of each branch of government. As such, the "credible argument" standard is the correct interpretation of the examination provisions. The Defendant argues that the Plaintiff's proposed interpretation is wrong, as it simply does not reflect what the examination provisions say. Furthermore, Parliament is aware of the standard currently applied and is satisfied with it. If Parliament wants to change the standard, it can enact legislation doing so; it has not.

[49] The parties' supporting arguments can generally be divided into three categories: those establishing the plain meaning of the statutes, those establishing the legislator's intent, and those regarding the effects of the institutional and constitutional contexts colouring the examination provisions.

[50] As the evidence relied upon by the parties appears in a further section, at this stage, I will simply summarize the parties' contentions.

a) *Plain Meaning*

[51] The Plaintiff submits that the plain meaning of the expression "to ascertain whether or not a bill is inconsistent with guaranteed rights" calls for the application of the "more likely than not inconsistent with guaranteed rights" standard.

[52] The Plaintiff cites many dictionary definitions that support his idea that the word "ascertain" calls for a flexible result. The Plaintiff desires a flexible interpretation of the examination provisions because he believes the duty to report should be more easily triggered, notably every time the Minister of Justice does not deem the proposed legislation more likely than not consistent with guaranteed rights. The Plaintiff argues that the interpretation, which only triggers the duty to report when the Minister of Justice opines that a proposed provision is no doubt inconsistent, is erroneous.

[53] The Plaintiff submits that the common meaning between the French "vérifier" and English "ascertain" is flexible and does not imply reaching a conclusion by performing a thorough searching review. Rather, the meaning of "ascertain" could notably be "to discover fact", "to make certain", "to discover", "to find truth or correct information", and "to find out the true or correct information".

[54] The Defendant counters that the Plaintiff limits the definitions of "ascertain" he cites to the Court as exceptions to other more common definitions, which rather support the Defendant's

interpretation. The Defendant suggests the Plaintiff is only citing obscure and arcane meanings of "ascertain" while ignoring the more generally accepted definitions.

b) *Legislator's Intent*

[55] The Plaintiff submits that the wording of the examination provisions key word "ascertain" means that the Minister of Justice must determine whether the proposed legislation is more likely than not inconsistent with guaranteed rights. The Plaintiff opines that the French and English evolutions of the word "to ascertain", over the course of legislative amendments and consolidations of the examination provisions, mean "to make sure". In order to establish the Legislator's intent, the Plaintiff notably relies on statements given by different Ministers of Justice over the years.

[56] First, to support this idea, the Plaintiff suggests that Minister Fulton's comments to the Special Committee on Human Rights and Fundamental Rights and Freedoms in 1960 explaining his idea for an examination and reporting mechanism intended to create a context of full information for Parliament to consider. Therefore, if the Minister ascertained any inconsistency with guaranteed rights, the Minister would report to Parliament.

[57] Second, the Plaintiff suggests that Minister Turner's comment in committee in 1971 discussing the statutory bill supports his interpretation. Notably, the Plaintiff suggests that the phrase "Our duty should be to make sure that before registration it is in accordance with the Canadian Bill of Rights", does not suggest that a credible argument in favour of consistency is

acceptable. Rather, the Plaintiff suggests that this phrase means two things: first, that the legislative intent was that provisions need to be consistent with guaranteed rights, second, that certification and the absence of a report is understood as an endorsement by the Minister of Justice that the provision is consistent with guaranteed rights.

[58] Third, the Plaintiff submits that Minister of Justice John Crosbie's statement to the House of Commons in 1985 reflected that the objective of the examination provisions was to "ensure consistency" and not simply to accept an argument in favour of consistency with guaranteed rights.

[59] In essence, the core of the Plaintiff's argument regarding the plain meaning of the examination provisions is that the words "not inconsistent" really mean "is consistent". The Plaintiff suggests the meaning of the examination provisions does not support the Defendant's thesis that an argument favouring consistency is sufficient, but rather that a result consistent with guaranteed rights must be achieved. If that clear result in favour of guaranteed rights is not attained, Parliament is dutifully informed that this result has not been reached. To further support his plain meaning analysis, the Plaintiff submits that the wording "ascertain whether" is different than "ascertain that". The Plaintiff submits that when you "ascertain whether", you are confirming or negating the proposition that is at issue. A proposition must therefore either be consistent with guaranteed rights or not. There is no space for a credible argument in favour of consistency within this strict binary framework.

[60] The Defendant counters with his own cornucopia of dictionary definitions and ministerial statements defending his thesis that "ascertain whether" calls for a searching review to be performed. One answer does not imply its negative opposite; determining that an inconsistency exists does not mean that the proposed legislation is automatically inconsistent. Rather, it is acceptable that there be a risk of inconsistency if such a risk is justifiable for credible reasons. It is the Minister of Justice's prerogative to aggregate all risk factors, whether they are political or juridical, in order to reach her own conclusion. The Minister of Justice is not bound by the result of a legal analysis performed by Department of Justice staff.

c) *Constitutional and Institutional Context*

[61] The Plaintiff submits that the Defendant erroneously relies on the wider institutional context in which the examination provisions operate in order to establish his position. The Plaintiff insists that the five internal documents contained in the *Statement of Agreed Facts* are sufficient to settle the case in his favour. He argues the documents contained in the *Statement of Agreed Facts* alone show that the Minister is not correctly interpreting the strict requirements of the examination provisions. There is no need to look at other wider concepts: the context is narrow and everything the Court needs to fulfil its interpretative role is found within the law and the documents provided.

[62] The Plaintiff submits that according to Driedger's principle of modern interpretation, the context of the examination provisions is determined by the presence of the different pieces of legislation together making up the examination and reporting duties. In the Plaintiff's view, the

wider context in which the examination provisions operate can be gleaned from a grammatical analysis of the English and the French texts.

[63] The Plaintiff argues that the examination provisions are divided in three grammatical structures: the infinitive verb "to ascertain", the conjunction "whether", and the proposition put at issue by "whether". The Plaintiff proposes that the grammatical parts are independent from each other and ultimately reflect the notion that proposed legislation is either consistent or not; there is no in-between space for a credible argument standard to operate. The result of the situation examined by "whether" is binary: you have to choose one outcome or the other, consistent or inconsistent. A negation is always in relation to a positive; if proposed legislation is not consistent with guaranteed rights, it is inconsistent; therefore the duty to report is triggered.

[64] Addressing wider constitutional and institutional arguments, the Plaintiff submits that the Executive of the day must respect the democratic process by which the *Charter* and our institutional frameworks were developed. The Plaintiff suggests that the credible argument standard currently applied by the Department of Justice does not respect the spirit of our constitutional framework as it allows the Executive to introduce legislation that is inconsistent with guaranteed rights.

[65] The Plaintiff argues that the rule of law calls for the Minister of Justice to lawfully fulfil her role. By applying the "credible argument" standard, the Minister is flouting the application of her statutory duties and thus breaching the rule of law. Public counsel within the government

have a higher duty to objectively and fairly apply laws. The main duty of the Minister of Justice, and incidentally of public service counsel, is to enhance respect for the Constitution and the law.

[66] The Plaintiff proposes that the Courts should only be consulted when state actors acting in good faith enact legislation and a citizen simply disagrees. A court's purpose is to resolve good faith differences of view, not to discipline an unruly Executive that believes it is acting honestly and reasonably. If the Minister of Justice does not have an honest and reasonable belief that she is acting in accordance with the law, then she is breaching fundamental principles. Thus, the unacceptable effect of the "credible argument" standard is that it allows the Executive to submit legislation to Parliament which it does not believe more likely than not consistent with guaranteed rights. Accordingly, the "credible argument" standard is a breach of the Executive's duty and is not lawful. The "credible argument" standard is not consistent with the context of a democratic constitutional state. The Plaintiff argues the Executive should not override or disregard statutes passed by Parliament who delimit the quality of draft legislation. The Plaintiff proposes that inconsistent legislation may only be enacted by invoking the notwithstanding clause.

[67] The Defendant counters by proposing that the Plaintiff ignores the true constitutional context in which the examination provisions operate. The Plaintiff mistakenly assumes the only applicable constitutional principle is the rule of law. Rather, the Defendant proposes the rule of law is in fact nuanced by other constitutional principles, namely democracy and separation of powers. Each branch has its constitutionally defined role to play. The Defendant argues the Plaintiff conflates the duty of the Minister of Justice to be legal counsel to the Executive with the

Minister's statutory duty to report to Parliament. The Minister of Justice is the legal advisor to Cabinet and not to Parliament. Yes, she is mandated by the examination provisions to inform Parliament if she ascertains that an inconsistency with guaranteed rights exists, but her duty to Parliament does not extend to providing it with her legal advice. Parliament has its own mechanisms and resources which allow it to form its own opinion in regards to inconsistencies and in regards to resolving them. The Defendant suggests that the constitutional context in which the examination provisions operate clearly shows that the Minister of Justice's duty to examine and report is meant to prevent inconsistent legislation from ever even being proposed to Parliament in the first place. The examination provisions, in their proper constitutional and institutional context, currently operate efficiently as structural and political deterrents against inconsistent draft legislation.

[68] The Plaintiff responds that the fact that Parliament has other tools to study a bill does not mean Parliament should disregard the importance of the Minister of Justice's obligation to examine and report. The Plaintiff argues that the obligation to examine and report of the Minister of Justice is intended to support the other tools Parliament has at its disposal. The Minister's report, or lack thereof, is part of Parliament's toolbox in assessing bills, as are debates, discussions and experts in committee. Parliament is not bound by the Minister's opinion, but the information is for Parliament. Parliament, following that information, can use its resources to obtain more information. The Plaintiff submits that regardless of all the other resources Parliament has to obtain information, the existence of those tools does not excuse the Minister for failing to accomplish her statutory duties as defined by the examination provisions.

Part (4) -- The Intervener's Position (Canadian Civil Liberties Association)

[69] The Canadian Civil Liberties Association [CCLA] opines that the "credible argument" standard is not in the Executive's interest, not in Parliament's interest, and not in the public's interest. The CCLA argues that lawyers within the public service, including the Minister of Justice, have a larger duty than simply to serve the Executive: they must uphold the rule of law. Part of that duty involves protecting citizens against the despotism of officials and providing an objective and balanced interpretation of the law. There must be a fair inquiry as to what the law truly is, not an unwarranted stretching of the law to fit a client's wishes. The CCLA submits that the effect of the "credible argument" standard undermines the rule of law by allowing the Executive to introduce laws in Parliament that have very little chances of surviving a challenge in front of the Judiciary. If the possibility of a successful challenge is very strong and the Executive still denies an inconsistency with guaranteed rights, such a situation is the antithesis of respect for the law. The CCLA understands that arguments justifying inconsistencies under section 1 of the *Charter* may be broad and that the Minister of Justice cannot be expected to anticipate every possible scenario, but in the CCLA's view, such a reality does not justify the "credible argument" standard. If every argument is accepted, the reporting requirement is essentially meaningless.

[70] The "credible argument" standard fails to make the issue of whether there is a departure from guaranteed rights a site of democratic debate in Parliament. The CCLA submits that the examination provisions should be interpreted in a way that facilitates Parliament's role in

engaging in meaningful discussion before legislation is enacted and before court challenges are initiated.

[71] Parliament's role is to represent the Canadian population through elections. Section 1 and section 33 of the *Charter* effectively reflect this fact as they foster careful debate and scrutiny within Parliament. Section 1 states that reasonable limits on rights and freedoms guaranteed by the *Charter* must be "demonstrably justified", placing the onus of justification on government not only at the stage when a law is challenged in court, but when limitations on rights are created in the law. Section 33 contemplates that Parliament can and will frankly declare any departures from the *Charter*. To put it simply, the CCLA proposes that the *Charter*'s influence goes beyond being a tool to analyze the reasonableness of derogations to rights during litigation but in fact points to broader principles of separation of powers that should be construed as applying to the pre-legislative process.

[72] Parliament's responsibilities include determining whether limits placed on rights by legislation can be demonstrably justified. To properly fulfil this role, Parliament needs information. The CCLA agrees that the internal processes within the Department of Justice to minimize risks are, in theory, effective at mitigating the risk of inconsistent draft legislation being introduced in Parliament. The problem lies not in the process but in the availability of the information confirming that this process has effectively taken place. Under the current system, Parliament has no way of knowing on which credible argument the government will rely should a challenge arise due to solicitor-client privilege and the principle of cabinet confidences.

[73] Furthermore, not all potentially inconsistent legislation is challenged in court; allowing such legislation to be enacted by Parliament, without it being informed of its dubious nature, opens the window to the public being ruled by laws inconsistent with guaranteed rights. Yes, the Courts have their role to play, but the current system effectively skips Parliament's role in reviewing legislation. The CCLA, citing Professor Janet L. Hiebert in her article "Parliamentary Engagement with the Charter: Rethinking the Idea of Legislative Rights Review" (2012) 58:2 SCLR 87, proposes that the absence of a ministerial report on inconsistencies with guaranteed rights has dissuaded Parliament from participating in assessing the compatibility of proposed legislation. The CCLA also brings up the issue of imposing on the wider public the responsibility of contesting legislation it deems potentially inconsistent with guaranteed rights. The CCLA does not believe any examination or reporting mechanism would eliminate constitutional litigation between individuals and the government; but a standard providing Parliament with access to more information about the vetting process would create more opportunities for Parliament to address concerns and reduce the amount of public challenges necessary.

[74] As described in the overview of this decision, I will approach the issues of the case at hand by performing an analysis divided in three major parts: first I will explore the plain meaning; second, I will determine the overall legislative intent behind the relevant statutes; and third, I will examine the constitutional and institutional contexts.

III. HISTORY OF THE PERTINENT STATUTES

A. Introduction

[75] In this section, I will detail the legislative history of the Minister of Justice's obligation to examine legislation and to report inconsistencies. I will explore three major iterations of the obligations and their respective legislative evolution: (1) Section 3 of the *Bill of Rights*; (2) Section 4.1 of *the Department of Justice Act*; and sections 3(2) and 3(3) of the *Statutory Instruments Act* in regards to regulations specifically. These three statutes, taken together, are referred to as the "examination provisions".

[76] This exercise will allow us to begin analyzing the legislator's intent, and eventually will contribute to ascertaining the correct standard applicable to the examination provisions. While performing this analysis of the legislative history, I will indicate the French equivalent of all relevant provisions in parentheses. As we will see in further sections of this decision, it will be necessary to note the differences between the evolution of the French provisions and the English provisions. The French equivalencies will be indicated in parentheses as so: ("French equivalent").

B. Section 3 of the *Canadian Bill of Rights*

[77] The following table encapsulates the legislative history analysis I will perform in this section; the underlining is my emphasis:

Bill C-60, September 5th, 1958 (*Bill of Rights* first reading)	Projet de loi C-60, le 5 septembre 1958 (première lecture de la *Déclaration canadienne des droits*)
4. Duties of the Minister of Justice	4. Devoir du ministre de la justice
- examine every proposed regulation [...] and every Bill [...] - to ensure that the purposes and provisions of this Part in relation thereto are fully carried out.	- Examiner toute proposition - en vue d'assurer le plein accomplissement des fins et dispositions de la présente Partie à cet égard.
Bill C-79, June 27th, 1960 (*Bill of Rights* first reading in a later session)	Projet de loi C-79, le 27 juin 1960 (première lecture lors d'une session ultérieure, *Déclaration canadienne des droits*)
4. Duties of the Minister of Justice	4. Devoir du ministre de la Justice
- examine every proposed regulation [...] and every Bill [...] - in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part.	- Examiner toute proposition de règlement [...] comme tout projet ou proposition de loi [...] - en vue de constater si l'une quelconque de ses dispositions est incompatible avec les fins et dispositions de la présente Partie.
Bill of Rights, August 10th, 1960 (*Bill of Rights* as first enacted)	*Déclaration canadienne des droits*, le 10 août 1960 (*Déclaration canadienne des droits*, telle qu'elle a été promulguée initialement)
3. Duties of the Minister of Justice	3. Devoir du ministre de la Justice
- examine every proposed regulation [...] and every Bill [...] - in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.	- examiner toute proposition de règlement [...] comme tout projet ou proposition de loi [...] - en vue de constater si l'une quelconque de ses dispositions est incompatible avec les fins et dispositions de la Présente Partie, et il doit signaler toute semblable incompatibilité à la Chambre des communes dès qu'il en a l'occasion.
Amendment effected by SC 1970-71-72, c 38, s 29 (to the *Canadian Bill of Rights*) (as per s 29) as a result of the *Official Languages Act*	Modification apportée par SC 1970-71-72, c 38, art 29 (à la *Déclaration canadienne des droits*) (aux termes de l'art 29), en raison de la *Loi sur les langues officielles*
3. Duties of Minister of Justice (as it now stands changed in 1970)	3. Devoirs du ministre la Justice (version maintenant amendée en 1970)

- examine every regulation [...] and every Bill [...] - in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.	- examiner tout règlement [...] comme tout projet ou proposition de loi [...] - en vue de rechercher si l'une ou quelconque de ses dispositions est incompatible avec les fins et dispositions de la présente Partie, et il doit signaler toute semblable incompatibilité à la Chambre des communes dès qu'il en a l'occasion.
Amendment effected by SC 1985, c26, s105 (to the *Canadian Bill of Rights* after the *Charter*) (as per s. 105)	Modification apportée par LC 1985, c 26, art 105 (à la *Déclaration canadienne des droits* après la Charte) (aux termes de l'art 105)
3. (1) Duties of the Minister of Justice	3. (1) Devoirs du ministre de la Justice
- examine every regulation [...] and every Bill [...] by a Minister of the Crown - in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.	- examiner tout règlement [...] ainsi que tout projet ou proposition de loi [...] par un ministre fédéral - en vue de rechercher si l'une ou quelconque de ses dispositions est incompatible avec les fins et dispositions de la présente Partie, et il doit signaler toute semblable incompatibilité à la Chambre des communes dès qu'il en a l'occasion.

Part (1) -- Bill C-60, 1958 – First Draft of the *Bill of Rights*

[78] Bill C-60 at section 4, September 5, 1958 (first reading) was the very first iteration of what would eventually be enacted as the *Canadian Bill of Rights*. The initial bill, in 1958, introduced the concept of an obligation imposed on the Minister of Justice to examine every bill and every regulation in light of the *Bill of Rights*. The Minister of Justice was to be called upon to "examine" ("examiner") regulations and every bill in order to "ensure" ("en vue d'assurer") that the purposes and provisions of the *Bill of Rights* "are fully carried out" ("le plein accomplissement"). No ministerial reporting to the House of Commons was required. Bill C-60 did not become law.

Part (2) -- Bill C-79, July 1960 – Second Draft of the *Bill of Rights*

[79] In a new parliamentary session, in 1960, Parliament again considered a bill that would potentially become the *Bill of Rights*. This time, the bill was titled Bill C-79. At the first reading of Bill C-79, on July 27, 1960, at section 4, the word "ensure" ("assurer") from the 1958 version, was changed to "ascertain" ("constater"), followed by "whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part."

[80] Like above, this bill did not provide for any ministerial reporting to the House of Commons. The change of wording was the subject of discussions at the Special Committee on Human Rights and Fundamental Freedoms. There, it was felt that the change to "ascertain" ("constater") from "ensure" ("assurer") was weakening the duty of the Minister of Justice. In response to that concern, Minister of Justice Fulton proposed to insert a ministerial reporting mechanism to the House of Commons that would: "[...] compel the Minister [...] to report to Parliament in any case where, in his opinion, there is an infraction in any of the documents or statutes he has examined" (Canada, Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, July 20-29, 1960).

Part (3) -- Enactment of the *Bill of Rights*, August 1960

[81] The *Canadian Bill of Rights*, at section 3, as it became law on August 10, 1960, included not only the change of wording from "ensure" ("assurer") to "ascertain" ("constater") but also an

obligation on the part of the Minister of Justice to report to the House of Commons any such "inconsistency" ("incompatibilité") at the "first convenient opportunity."

Part (4) -- Amendment to the *Canadian Bill of Rights* by SC 1970 as a Response to the *Official Languages Act*

[82] In a consequential amendment to the coming into force of the *Official Languages Act* in 1969 and as a result of consolidation by SC 1970-71-72, c 38, s 29, the *Bill of Rights*, at section 3, was amended to replace the obligation to review "every proposed regulations submitted in draft form" to "every regulations transmitted" ("proposition de règlement soumise, sous forme d'avant-projet"). In addition, the French text was amended to change the word "ascertain" ("constater") to ("rechercher"). (See Consolidated Legislative History of s 3 of *Canadian Bill of Rights*, SC 1960, c 44, and also Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and legal Affairs on Bill C-182*, Statutory Instruments Act, 28th Parl, 3rd Sess (16 February 1971) at 2734.)

Part (5) -- *Bill of Rights* Amended in 1985

[83] In 1985, the *Bill of Rights* was again amended at section 3.1 to specify that only ministerial bills were to be the subject matter of an examination, contrary to the previous wording which provided that all bills introduced or presented to the House of Commons had to be examined. In other words, private members' bills were removed from the purview of the

examination provision. This change brings section 3.1 of the *Bill of Rights* to its present form. The current version of section 3.1 of the *Bill of Rights* reads as follows:

Canadian Bill of Rights, SC 1960, c 44	*Déclaration canadienne des droits*, SC 1960, c 44
Duties of Minister of Justice	Devoirs du ministre de la Justice
3. (1) Subject to subsection (2), the Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.	3. (1) Sous réserve du paragraphe (2), le ministre de la Justice doit, en conformité de règlements prescrits par le gouverneur en conseil, examiner tout règlement transmis au greffier du Conseil privé pour enregistrement, en application de la *Loi sur les textes réglementaires*, ainsi que tout projet ou proposition de loi soumis ou présentés à la Chambre des communes par un ministre fédéral en vue de rechercher si l'une quelconque de ses dispositions est incompatible avec les fins et dispositions de la présente Partie, et il doit signaler toute semblable incompatibilité à la Chambre des communes dès qu'il en a l'occasion.
[Emphasis added.]	[Je souligne.]

C. Section 4.1 of the *Department of Justice Act*

[84] The Department of Justice came into existence in May 1868 following the enactment of the *Department of Justice Act*, formally replacing the informal structure that had existed prior to confederation. In 1985, many federal laws were amended to reflect the coming into force of the *Canadian Charter of Rights and Freedoms*. Consequentially, the *Department of Justice Act* was amended to include the following section, numbered section 4.1:

Department of Justice Act, RSC 1985, c J-2	*Loi sur le ministère de la Justice*, LRC 1985, c J-2
Examination of Bills and regulations	Examen de projets de loi et de règlements
4.1(1) Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the Statutory Instruments Act and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.	4.1(1) Sous réserve du paragraphe (2), le ministre examine, conformément aux règlements pris par le gouverneur en conseil, les règlements transmis au greffier du Conseil privé pour enregistrement, en application de la Loi sur les textes réglementaires ainsi que les projets ou propositions de loi soumis ou présentés à la Chambre des communes par un ministre fédéral, en vue de vérifier si l'une de leurs dispositions est incompatible avec les fins et dispositions de la *Charte canadienne des droits et libertés*, et fait rapport de toute incompatibilité à la Chambre des communes dans les meilleurs délais possible.
[Emphasis added.]	[Je souligne.]

[85] As it can be noted, the English text, except for the new inclusions that reflect the purposes and provisions of the *Charter*, is similar to the text analyzed in section 3 of the *Bill of Rights*. Notably, the English version keeps identical the expression "in order to ascertain" from one version to the other. But such is not the case for the French text, which changes the expression ("en vue de rechercher") to ("en vue de vérifier").

D. Section 3 of the *Statutory Instruments Act*

Part (1) -- First Examination Procedure in the 1950 *Regulations Act*

[86] The original statute dealing with delegated legislation was the *Regulations Act* enacted in 1950, SC 1950, c 50. In 1971, over the course of a major review of laws dealing with regulations, the *Regulations Act* was completely transformed into what is now known as the

Statutory Instruments Act. The "examination procedure", as it was referred to then, became the "judicial scrutiny" of the Department of Justice. The term "delegated legislation" essentially means that Parliament has delegated the power to make certain regulations, orders, rules and by-laws to another entity.

Part (2) -- Bill C-182's Goal to Restore Parliamentary Control over the Executive

[87] The general purpose of Bill C-182, as it was known then, was to protect the public from the improper or unusual exercise of power that had been delegated by Parliament. The *Commons Debates* of January 1971 enumerated four objectives in regards to the enactment of regulations at page 2735: (1) "that they be authorized pursuant to the statute by which they are to be made"; (2) "that they do not constitute an unusual or unexpected use of the authority pursuant to which they are to be made"; (3) "that they do not trespass unduly on existing rights and freedoms and are not, in any case, inconsistent with purposes and provisions of the *Canadian Bill of Rights*"; and (4) "that the form and draftsmanship of the proposed regulations are in accordance with established standards". The *Statutory Instruments Act* essentially aimed to restore a measure of parliamentary control over the Executive. The Clerk of the Privy Council, with the Deputy Minister of Justice, was obligated to examine proposed regulations (Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs on Bill C-182, Statutory Instruments Act*, 28th Parl, 3rd Sess (16 February 1971) at 7:22 to 7:24 and House of Commons Debates, 28th Parl, 3rd Sess, Vol III (25 January 1971) at 2734-2736).

Part (3) -- Amendment to the *Statutory Instruments Act* in 1985 to Ensure Consistency with the *Charter*

[88] In 1985, as seen earlier in regards to the *Bill of Rights* and the *Department of Justice Act*, the *Statutory Instruments Act* was also amended to ensure consistency with the coming into force of the *Charter*. The only important modification is the insertion of the obligation to examine proposed regulations in accordance not only with the purposes and provisions of the *Bill of Rights*, but also with the *Charter*.

[89] Subsections 3 (2) and 3 (3) of the *Statutory Instruments Act* remain essentially the same save for a few non-consequential changes brought to the French text. Subsections 3 (2) and 3 (3) read as follows:

Statutory Instruments Act, RSC 1985, c S-22	*Loi sur les textes réglementaires*, LRC 1985, c S-22
Examination	Examen
3(2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that	3(2) À la réception du projet de règlement, le greffier du Conseil privé procède, en consultation avec le sous-ministre de la Justice, à l'examen des points suivants :
(a) it is authorized by the statute pursuant to which it is to be made;	a) le règlement est pris dans le cadre du pouvoir conféré par sa loi habilitante;
(b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;	b) il ne constitue pas un usage inhabituel ou inattendu du pouvoir ainsi conféré;
(c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and	c) il n'empiète pas indûment sur les droits et libertés existants et, en tout état de cause, n'est pas incompatible avec les fins et les dispositions de la *Charte canadienne des droits et libertés* et de la *Déclaration canadienne des droits*;

(d) the form and draftsmanship of the proposed regulation are in accordance with established standards.	d) sa présentation et sa rédaction sont conformes aux normes établies.
Advise regulation-making authority	Avis à l'autorité réglementaire
3 (3) When a proposed regulation has been examined as required by subsection (2), the Clerk of the Privy Council shall advise the regulation-making authority that the proposed regulation has been so examined and shall indicate any matter referred to in paragraph (2) (a), (b), (c) or (d) to which, in the opinion of the Deputy Minister of Justice, based on that examination, the attention of the regulation-making authority should be drawn.	3(3) L'examen achevé, le greffier du Conseil privé en avise l'autorité réglementaire en lui signalant, parmi les points mentionnés au paragraphe (2), ceux sur lesquels, selon le sous-ministre de la Justice, elle devrait porter son attention.
[Emphasis added.]	[Je souligne.]

[90] As it can be observed, for regulations, subsections 3(2) and 3(3) of the *Statutory Instruments Act* require two steps to be followed: first, an examination procedure, and second, a reporting mechanism. These steps are similar in nature to the steps required for bills under the *Bill of Rights* and the *Department of Justice Act*. It should also be noted that the wording of the *Statutory Instruments Act*'s examination provisions differs from the wordings of the two other statutes: for example, at subsection 3(2)(c), "does not trespass unduly", in French "n'empiètent pas indûment", is different than the expression "is not in any case inconsistent", in French "n'est pas incompatible", found in the other statutes. Furthermore, the reporting obligation is on the shoulders of the Clerk of the Privy Council, not on those of the Minister of Justice. More will be said on these differences between the *Bill of Rights* and the *Charter*, and between the examination and reporting obligations later on.

IV. PRINCIPLES OF STATUTORY INTERPRETATION

A. Introduction

[91] As seen, for the purposes of the present case, three different statutes must be interpreted (1) the *Bill of Rights*, (2) the *Department of Justice Act*, and (3) the *Statutory Instruments Act*.

[92] First, both sections 3.1 of the *Bill of Rights* and 4.1 of the *Department of Justice Act* will be interpreted. These two statutes share very similar wording but specific attention will need to be paid to the French text. The overall purposes of both statutes must be taken into consideration.

[93] Second, in regards to regulations, under the *Statutory Instruments Act*, the interpretation to be given will require that both the French and English texts be put into their specific contexts and then interpreted generally. The purpose of the *Statutory Instruments Act* is different than the purpose of the other two statutes and is useful as a comparison tool. Ultimately, the *Statutory Instruments Act* calls for the same conclusions to be drawn as the other two statutes.

B. Applicable Principles

Part (1) -- Driedger's Modern Interpretation

[94] The Supreme Court of Canada has often recognized Elmer Driedger's modern approach when interpreting statutes:

> "Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context and in their grammatical and ordinary

sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

(Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at para 2.1.)

Part (2) -- Sections 10 and 12 of the *Interpretation Act*

[95] It is also important to give full meaning to sections 10 and 12 of the *Interpretation Act*, RSC 1985, c I-21 when applying the modern interpretation approach to a statute. Section 10 reads as follows:

Interpretation Act, RSC 1985, c I-21	*Loi d'interprétation*, LRC 1985, c I-21
Law Always Speaking	Permanence de la règle de droit
10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.	10. La règle de droit a vocation permanente; exprimée dans un texte au présent intemporel, elle s'applique à la situation du moment de façon que le texte produise ses effets selon son esprit, son sens et son objet.

[96] Section 12 reads as follows:

Interpretation Act, RSC 1985, c I-21	*Loi d'interprétation*, LRC 1985, c I-21
Enactments deemed remedial	Principe et interprétation
12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Part (3) -- Context and Colouring of the Statutes

[97] Context, in this case, is not simply a wider statutory scheme; it is rather context in its widest possible constitutional scope. In order to properly situate the examination provisions, I

must assess them in light of what they represent within the very founding principles of constitutional monarchy and of democracy. The roles and duties of each branch cannot be treated as separate statutory schemes operating in silos from each other. Our Constitution provides for the creation of three institutions which are, in essence, the expression of our Canadian democracy at play: the Courts, the Executive, and Parliament. In the following analysis, I will use this approach to place the examination provisions in their appropriate context.

[98] Giving colour to the context in which the Minister's duties operate essentially means that a pure narrow legislative interpretation based on the plain meaning and the legislator's intent is not enough. In *Bell ExpressVu*, the Supreme Court of Canada recognized the crucial role of context when interpreting a statute:

> "The preferred approach recognizes the important role that context must inevitably play when a Court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article 'Statute Interpretation in a Nutshell' (1938), 16 *Can. Bar Rev.* 1, at p. 6: 'Words like people, take their colour from their surroundings'. This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive."
>
> (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559, at pages 580, 581)

Part (4) -- Shared Meaning Rule

[99] The French and English versions of a statute hold equal authority. But, when the terms used in one language are not properly reflected in the other, I must search for a common meaning to both expressions. I must do so while considering the context within which the statute operates

and also while factoring-in the legislator's intent. This approach is known as the "shared meaning rule" and has been defined by Prof. Pierre-André Côté as follows:

> "Unless otherwise provided, differences between two official versions of the same enactment are reconciled by deducing the meaning common to both. Should this prove to be impossible, or if the common meaning seems incompatible with the intention of the legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained."
>
> (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed (Toronto: Carswell, 2000) at 324)

Part (5) -- When a Statute is Almost Identical to Another Statute (*in pari materia*)

[100] Prof. Ruth Sullivan provides useful interpretative guidance when one or multiple statutes are almost identical to each other. When interpreting a section of a statute that is almost identical to another statute, a Court must first look at the intent and purpose of each statute:

> "When interpreting legislation, common law courts generally consider any statutes *in pari materia*, that is, any statutes dealing with the same subject matter as the statute to be interpreted. Their concern is to ensure coherence and consistency between the rules dealing with the same thing. Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject."
>
> (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at paras 13.25-13.27)

[101] Second, the Court must consider whether or not the two sections of the two different statutes have the same meaning for the purposes of their respective Acts. It is a well-recognized principle that the legislator is presumed to be knowledgeable and to know, when legislation is discussed, that another statute shares a similar, or almost similar wording. Prof. Côté articulates

this method in his book "Interprétation des lois" (Pierre-André Côté, *Interprétation des lois*, 4th ed (Montréal: Thémis 2014) at paras 1271-1286). Similarly, Prof. Sullivan also explains this approach in her book as follows:

> "In the context of related statutes, the presumption of coherence is relied on not only to resolve inconsistency, but also as a basis for drawing inferences about legislative intent. [...] Related statutes form an integrated scheme"
>
> (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at paras 13.31-13.32)

C. Steps for Proceeding to Analysis

[102] With all these principles in mind, what is the proper course to be followed in order to consider each one and arrive at a given meaning? In her book *Sullivan on the Construction of Statutes*, above, at paragraphs 2.1 to 2.10, Professor Ruth Sullivan examines the modern rules of statutory interpretation and suggests three questions that an interpreter must answer when attempting to identify the proper meaning of a statute. The three questions are:

1. What is the meaning of the legislative text?

2. What did the legislator intend? That is, when the text was enacted, what law did the legislator intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?

3. What are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislator is presumed to respect?

[103] In order to undertake such a search, an interpreter, as Prof. Sullivan suggests, at page 28, must begin with the ordinary meaning approach, which consists of the following propositions:

1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.

2. Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting related conventions, presumptions of legislative intent, absurdities to be avoided and the like.

3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from the ordinary meaning.

[104] Now that I have established our analytical framework, I will proceed with the first step of interpretation: identifying the plain meaning of the statutes.

V. ANALYSIS STEP 1 – PLAIN MEANING

A. Introduction

[105] The plain meaning calls for the interpreter to look at the vocabulary used and assess the obligations it creates. It is important to look at what the legislation requires of the Minister of Justice in both official languages when she assesses draft regulations or draft ministerial bills to be eventually introduced into the House of Commons. We must also distinguish the steps the statutory obligation entails: we are attempting to define the method by which the Minister must perform her examination; second, determining how the Minister must process the information she has acquired; and third, confirming whether the reporting obligation is triggered or not.

[106] In order to deal with all the issues raised in relation to the three statutes, the Court will first analyze sections 3(1) of the *Bill of Rights* and 4.1(1) of the *Department of Justice Act* together as they are in large part similar and both relate to bills.

[107] Second, the Court will analyze sections 3(2) of the *Bill of Rights* and 4.1(2) of the *Department of Justice Act* as they are analogous and both relate to an exception for regulations that have already been examined under the *Statutory Instruments Act*.

[108] Third, the Court will analyze sections 3(2), 3(2)(c) and 3(3) of the *Statutory Instruments Act* in both French and English.

[109] Finally, I will draw conclusions from the above analyses in order to determine the plain meaning in regards to the provisions creating the duties of the Minister of Justice.

[110] In order to avoid unnecessary repetition, the relevant statutes in their final form are attached to the end of this decision under "Annex 1". The following graph summarizes the approach I will follow in our plain meaning analysis; please note that "*Bill of Rights*" is reduced to "BOR", the "*Department of Justice Act*" to "DOJA", and the "*Statutory Instruments Act*" to "SIA":

A. Introduction

B. Sections of 3 (1) of the *Bill of Rights* and 4.1 (1) of the *Department of Justice Act* [Bills]

Part (1): What the Minister Must Examine

i. The Meaning of "ascertain"

- 3(1) BOR (ENG) = "ascertain" / 3(1) BOR (FRA) = "rechercher"
- 4.1(1) DOJA (ENG) = "ascertain" / 4.1(1) DOJA (FRA) = "vérifier"

ii. The Meaning of the Other Words in These Provisions

- *"Whether" = ("si") in both statutes*
- *"Inconsistent" = ("incompatible") in both statutes*

Part (2): If the Minister Identifies an Inconsistency She Must Report

i. *"Such inconsistency"* = (*"toute incompatibilité"*) in both statutes

ii. "Shall report" = ("fait rapport") in both statutes

Part (3): Observations

C. Sections 3 (2) of the *Bill of Rights* and 4.1 (2) of the *Department of Justice Act* [Exception for Regulations]

The Meaning of "ensure"

i. 3(2) BOR (ENG) = *"ensure"* / 3(2) BOR (FRA) = *"vérifier"*

ii. 4.1(2) DOJA (ENG) = "ensure" / 4.1(2) DOJA (FRA) = "vérifier"

D. Sections 3 (2), 3 (2) (c) and 3 (3) of the *Statutory Instruments Act* [Regulations]

i. 3 (2) SIA (ENG) = *"ensure"* / 3 (2) SIA (FRA) = *"examiner"*

E. Conclusion on the Plain Meaning

B. Sections 3(1) of the *Bill of Rights* and 4.1(1) of the *Department of Justice Act* [Bills]

[111] Both sections essentially indicate: the Minister is asked to ascertain whether the draft legislation and any of its provisions are inconsistent with guaranteed rights. If the Minister finds that such an inconsistency exists, the Minister shall report to the House of Commons.

[112] The following paragraphs will break down this process and analyze it from different angles. I will separate my analysis in two main parts in order to reflect the two steps: first, a duty to examine, and second, a duty to report. For each of those parts, I will look at the relevant words creating the duty in order to better discover their meanings. To do so, I will inspect both French and English versions of the statutes.

Part (1) -- What the Minister Must Examine

[113] The Minister is asked to ascertain whether the draft legislation and any of its provisions are inconsistent with guaranteed rights. The key words in the *Bill of Rights* and the *Department of Justice Act* creating this duty are: "ascertain", "whether", and "are inconsistent".

[114] To begin, properly examining the meaning of "ascertain" is key to our plain meaning analysis. In French, the equivalent wording for "ascertain" is different in the wording of the *Bill of Rights* than in the *Department of Justice Act*. In the *Bill of Rights*, "ascertain" is "vérifier" but in the *Department of Justice Act*, "ascertain" is "rechercher".

[115] Furthermore, the other expressions in French are the same in both the *Bill of Rights* and the *Department of Justice Act*: "whether" is always "si", and "are inconsistent" is always "est incompatible".

Part (2) -- If the Minister Identifies an Inconsistency She Must Report

[116] The Minister, as both statutes require, must ascertain whether any of the provisions are "inconsistent", or "incompatible" in French, with guaranteed rights. If the Minister does indeed ascertain that such an inconsistency is present, the Minister must report to the House of Commons. The key words in the statutes creating this obligation are: "such inconsistency" and "shall report". In French, both statutes also use identical wordings: the equivalent wording for "such inconsistency" is always "toute incompatibilité" and "shall report" is always "fait rapport".

Part (3) -- Observations

[117] In the *Bill of Rights*, the French equivalent of "ascertain" is "rechercher", but in the *Department of Justice Act*, the French version of "ascertain" is "vérifier". I can observe that the word "vérifier", in the French version of section 4.1(1) of the *Department of Justice Act* does not, at first glance, properly reflect the meaning of the two other analogous expressions which

are "ascertain" and "rechercher". It is thus necessary to define each term in order to determine what ordinary meaning to give them. I have selected dictionary definitions that generally reflect what other dictionaries also say.

[118] First, the verb "ascertain" is defined by the *Webster's Ninth New Collegiate Dictionary*, 1986, as: "(1) to make certain, exact, or precise (2) to find out or learn with certainty". Definition "(1)" is indicated as "archaic" whereas definition "(2)" is not. Definition "(2)" is thus much more relevant.

[119] Second, the French dictionary *Le Petit Robert 1*, 1986, gives the following definitions to "rechercher": "(1) chercher de façon consciente, méthodique [...]; (2) chercher à connaître, à découvrir [...]; (3) tenter d'obtenir, d'avoir par une recherche [...]; (4) tenter, essayer de connaître [...]." "Rechercher" thus calls for attempting to obtain or know following a research process.

[120] Third, "vérifier" also requires a sense of examination and is defined in *Le Petit Robert 1* as: "(1) examiner la valeur pour computation avec les faits, ou par un contrôle de la cohérence interne [...]; (2) Examiner (une chose) [...]; (3) Reconnaitre ou faire reconnaitre une chose [...]; (4) S'avérer exact, juste [...]."

[121] Even if the French wordings are slightly different, the words "rechercher" and "vérifier" are similar in nature, similar in meaning, and similar in objective to the English version of those words which is "ascertain". In both versions, the Minister of Justice is being asked to verify or

search whether or not draft legislation is, or is not, in conformity with guaranteed rights. Therefore, the Minister of Justice is first asked to examine the draft legislation and second, to come to a conclusion, in other words to reach a result.

[122] Section 3(1) of the *Bill of Rights* and section 4.1(1) of the *Department of Justice Act* also specify that the Minister must ascertain "whether" any of the provisions "are inconsistent" with guaranteed rights. In French, the equivalent expression for "whether" is "si" and the equivalent expression for "are inconsistent" is "est incompatible". In both languages, the legislator chose the same verb and the same present tense: it uses "are", which is "est" in French, to speak of the moment as it actually occurs. The English word "inconsistent" is defined by the *Webster's Ninth New Collegiate Dictionary* as "lacking consistency, not compatible with another fact." In French, *Le Petit Robert 1* defines "incompatible" as not being able to coexist with: "qui ne peut coexister, être associé, réuni (avec une autre chose)". Whether in French or in English, both adjectives call for a binary result, for opposites, for contradictions. The question asked is: "Is it breaching or not a guaranteed right; yes or no?" In both languages, the vocabulary used calls for an identical outcome.

[123] Pursuant to section 10 of the *Interpretation Act*, as seen above, the moment when the Minister must determine whether an inconsistency with guaranteed rights exists is at the specific moment where she examines the provisions and forms her opinion. The Minister does not look into the future or into the past to search for inconsistencies; her opinion must be formed at the moment where she performs her examination duty. The time of appreciation of the inconsistency is as the examination happens, not before or after.

[124] The duty is neither backward-looking nor forward-looking; it is present looking only. The examination provisions do not require the Minister to gaze into a crystal ball in order to hypothetically consider whether the provisions could be found inconsistent in the future by another person, by another institution, or under a different social context. For example, a law could be considered free of inconsistencies when it is enacted, but due to shifts in public perception over years be found inconsistent with guaranteed rights by a Court decades later. The examination provisions do not require the Minister to imagine such shifts. Both the *Bedford* case, *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101, 366 DLR (4th) 237, and the *Carter* case, *Carter v Canada (Attorney General)*, [2015] 1 SCR 331, 384 DLR (4th) 14, are good examples of this.

C. Sections 3(2) of the *Bill of Rights* and 4.1(2) of the *Department of Justice Act* [Exception for Regulations]

[125] Section 3(2) of the *Bill of Rights* and section 4.1(2) of the *Department of Justice Act* both use similar vocabulary to create an exception to the Minister's duties to examine and report in regards to regulations. The effect of the exception is that the Minister does not need to perform her duties under sections 3(1) and 4.1 if the regulations have already been scrutinized for inconsistencies under the process created by section 3 of the *Statutory Instruments Act*. In short, there is no need to re-examine regulations under the provisions of the *Bill of Rights* and of the *Department of Justice Act* if they have already been examined pursuant to the provisions of the *Statutory Instruments Act*. The application of this exception is not relevant to the plain meaning analysis; rather, it is the vocabulary used which is a key factor to our purposes.

Part (1) -- The Meaning of "ensure"

[126] Both the *Bill of Rights* and the *Department of Justice Act* use the word "ensure" to define the duty of the Minister of Justice in regards to regulations. Contrary to sections 3(1) of the *Bill of Rights* and 4.1(1) of the *Department of Justice Act*, I immediately notice that there is no discrepancy between the vocabulary used in the equivalent French versions of sections 3(2) of the *Bill of Rights* and 4.1(2) of the *Department of Justice Act*. Both French versions use "vérifier" as the equivalent of "ensure". This consistent vocabulary helps guide our analysis of the issue above where multiple terms were confusedly used. It is immediately clear that "vérifier" is the proper intended meaning for "ensure", and not "ascertain". But, even though "vérifier" is the clear French equivalent to "ensure", the two expressions differ in their meanings: "vérifier" is a much weaker expression than "ensure".

[127] The verb "ensure" is defined by the *Webster's Ninth New Collegiate Dictionary* as: "to make sure, certain, or safe". By contrast, as indicated above, "vérifier" has multiple definitions: "(1) Examiner la valeur pour computation avec les faits, ou par un contrôle de la cohérence interne [...]; (2) Examiner (une chose) [...]; (3) Reconnaitre ou faire reconnaitre une chose [...]; (4) S'avérer exact, juste [...]." From these definitions, I can conclude that "vérifier" implies less certainty of result than "ensure". There is thus a dissonance between the meaning of "ensure" and "vérifier". The effect of this discordance is that "vérifier" weakens the notion of certainty found within "ensure".

D. Sections 3(2), 3(2)(c) and 3(3) of the *Statutory Instruments Act* [Regulations]

[128] Contrary to the *Bill of Rights* and to the *Department of Justice Act*, the *Statutory Instruments Act* establishes specific examination and reporting duties in regards to regulations, as opposed to bills. Section 3(3) of the *Statutory Instruments Act* imposes the reporting duty on the Clerk of the Privy Council whereas the relevant sections of the *Bill of Rights* and of the *Department of Justice Act* impose the reporting duty on the Minister of Justice. Although it is not directly useful for determining the Minister's obligation in regards to ministerial bills, the *Statutory Instruments Act* can be used to apply the shared meaning rule in order to compare and contrast the vocabulary and obligations found in the other two statutes.

[129] Section 3(2) of the *Statutory Instruments Act* suffers from an inconsistency between the French and English versions. The English version first states that the Minister "shall examine", followed by the objective of that examination in the words "to ensure that". The French version also first states "procède [...] à l'examen" but afterwards does not state an objective akin to "to ensure" as found in the English version. It is possible to reconcile this lacuna by simply reading the missing French objective from the French wording "procède [...] à l'examen" itself; meaning that the Minister must perform an examination and that the objective of the examination is to examine. Such a conclusion, compared to the English objective "to ensure", implies a considerably weaker objective.

[130] Furthermore, we can also compare the use of the words "ensure" in English and "examen" in French, which is simply "examiner" in nominal form. Once again, the meaning of

"ensure" is problematic: to recapitulate, sections 3(2) of the *Bill of Rights* and 4.1(2) of the *Department of Justice Act* use the word "vérifier" for "ensure", but "ensure" in the French version of the *Statutory Instruments Act* can be said to be "examiner". *Le Petit Robert 1* defines "examiner" as: "(1) Considérer avec attention, avec réflexion; (2) Regarder très attentivement." These definitions of "examiner" are quite different than what "ensure" implies. "Ensure" denotes a guarantee whereas "examiner" implies a thorough, complete and attentive consideration. There is no notion of guarantee in "examiner". Both the use of "vérifier" as the equivalent of "ensure" in the other two statutes, and the use of "examiner" as the equivalent of "ensure" in the *Statutory Instruments Act* further weaken the connotation linked to a notion of guarantee in the word "ensure".

E. Conclusion on the Plain Meaning

[131] We must proceed with caution: the strict dictionary definitions of the terms guide our plain meaning analysis; they do not dictate the result of the meaning of the words used in their statutory context. The definitions of the words are very useful, but we must compare and contrast these definitions with the way the words are used in the statutes. When comparing the two dictionary definitions of the English terms "ascertain" and "ensure" the differences and the similarities between the two terms become obvious. As per the dictionaries, "ensure" calls for certainty of result whereas "ascertain" calls for a searching review resulting in a conclusion. In both cases, "ascertain" and "ensure" call for certainty to be achieved, for a result to be obtained.

[132] Having reviewed the plain language of section 3(1) of the *Bill of Rights* and section 4.1(1) of the *Department of Justice Act*, I conclude that the statutory obligation imposed on the Minister to examine bills and regulations is clear and non-ambiguous. The plain language analysis does not reveal that an alternate interpretation other than the plain language is warranted. The process and the content of the Minister of Justice's duty to examine draft legislation and to report if an inconsistency is found is clear following a plain language reading of the examination provisions. The duty of the Minister can be enunciated as follows.

[133] After a bill is tabled in the House of Commons, the Minister is required to identify, with certainty, whether the result of her examination identifies present inconsistencies in any of the provisions under study, with any rights guaranteed by the *Bill of Rights* or the *Charter*. If indeed the Minister identifies an inconsistency, she is obligated to report the inconsistency to the House of Commons at the first convenient opportunity.

[134] We can also express the same duty to examine in the negative grammatical sense: if the Minister, in her own examination, considers that an argument of a serious and professional nature exists, showing that the provisions under study are in conformity with guaranteed rights, she cannot ascertain nor conclude that there exists an inconsistency with the rights protected by the *Bill of Rights* and the *Charter*.

[135] Thus, the plain language shows that the wordings of these sections do not support nor include a "more likely than not inconsistent" standard. To try to read an array of options to be looked at or a weighing to be done, at the stage of the outcome, into this legislative language,

would not be respecting the plain language as it is used. Both the French and English words "ascertain", "vérifier", "rechercher", "examiner", "whether", "si", "inconsistent", and "incompatibilité", whichever way you look at them, call for a certainty, for a definite result. That is not what the "more likely than not inconsistent" standard requires. At the risk of being simplistic, such a standard is "inconsistent", "incompatible", with the vocabulary selected by the legislator for the purposes of both statutes.

[136] The wording, as expressed in the *Statutory Instruments Act*, imposes the same obligation on the Clerk of the Privy Council as the Minister's under the *Bill of Rights* and under the *Statutory Instruments Act*, namely to "ensure" that any of the provisions "is not inconsistent" ("n'est pas incompatible") with the guaranteed rights. Such language does not favour the use of the "more likely than not" standard. To the contrary, it seems to open the door to a certain tolerance for inconsistencies with guaranteed rights and at the same time, obligates the Clerk of the Privy Council to report if a regulation, or a provision of a regulation, is inconsistent ("incompatible") with guaranteed rights. Again, in his examination and reporting duties, the Clerk of the Privy Council is being asked to make an incompatibility finding, which does not leave room for options to be considered or a weighing to be done.

[137] In short, the vocabulary used, and the duties created by sections 3(2), 3(2)(c) and 3(3) of the *Statutory Instruments Act*, in their plain meaning, are consistent with the analogous sections of the *Bill of Rights* and of the *Department of Justice Act*; the language is clear and unambiguous.

[138] The relevant sections of the three statutes impose on the Minister or on the Clerk of the Privy Council the same type of obligation for both bills and regulations. The purpose of the obligation is to ascertain (for bills), or ensure (for regulations), that no provisions are inconsistent with the statutes that describe and protect our guaranteed rights.

[139] This conclusion on the plain meaning is supported by the intent of the legislator. As the next section will demonstrate, the legislator's intent is shown notably by the discussions leading to the present iterations of the concerned bills and regulations and also by the role the Courts, the Executive and Parliament are called to play when assuming their respective jurisdictions and duties.

VI. ANALYSIS STEP 2 – THE LEGISLATOR'S INTENT

A. Introduction

[140] In order to grasp the legislator's intention behind the examination provisions, I must go back to the discussions on the *Bill of Rights* prior to its enactment in the summer of 1960. I will also explore the legislator's intent in regards to other statutes, notably the *Statutory Instruments Act* in the 1970s, and the consequential amendments to certain statutes following the enactment of the *Charter* in the mid-1980s.

[141] In order to give the most complete picture possible of the various discussions that occurred surrounding the examination provisions over time, the parties have submitted diverse forms of evidence for the Court to consider. When determining the legislator's intent, it is an

accepted principle that statements by ministers hold more weight than statements made by other parties such as scholars, departmental representatives, and opposition members. Yet the involvement of non-ministerial actors remains a useful tool to detail and contextualize the explanations given by ministers; their input should not be dismissed. The following segment, which is lengthy, aims to show the wide array of deliberations that were discussed over several decades. After this in-depth contextualization, I will formulate conclusions on the legislator's intent.

B. Legislative History

Part (1) -- July 1960 -- Minister of Justice Fulton (*Bill of Rights*)

[142] In July 1960, in front of the Special Committee on Human Rights and Freedoms, during the clause-by-clause review of the draft *Bill of Rights*, Minister Fulton described the decision to use "ascertain" and not "ensure" for the examination provisions. The present section 3 of the *Bill of Rights* was referred to as clause 4 at the time.

> p. 332 **Mr. Fulton**: "[...] Then with regard to clause 4 of the bill, the clause with regard to the powers and responsibility of the Minister of Justice, you say you would like to see the word "ascertain" strengthened. It is, however, my view—I am not trying, even if I had the right, to cross-examine you; but this is a clause which has given us difficulty from time to time.
>
> When we drafted it first in 1958, the word was "ensure". Then, we looked at that ourselves and felt that word was a rather questionable one, because we felt: does that mean that the Minister of Justice, who is to ensure, must, by necessary implication, have the power to ensure? Does this give him some power of dictation over his colleagues in the cabinet or, indeed, over the rights of private members to introduce bills into the house? If the Minister of Justice is to ensure, how is he to do this, unless you give him the power to do it? We

> felt that parliament would not want to give a single minister of the government the right to say in what form bills should, or should not, be introduced.
>
> With respect to government bills, the matter is easier, because it goes through cabinet and presumably the view of the Minister of Justice as to the form of a bill would be accepted. But even there it is not desirable to give the Minister of Justice dictatorial powers over cabinet.
>
> But when we came to private members in parliament, we felt we were against a real difficulty. If you give the minister the responsibility to ensure, you must give him the power to ensure and then he may be too powerful; and that is why we changed the word to "ascertain"."

[143] Minister Fulton then explained the possible obligations of the Minister of Justice. Note that the reporting obligation does not yet exist and the final version of the *Bill of Rights* has not been agreed upon. Mr. Lower was a professor and Mr. Badanai and Mr. Batten were parliamentarians.

> p. 333 **Mr. Fulton**: "[...] In so far as government measures are concerned, I would think my function would be to advise the cabinet, or my colleagues in cabinet, as to whether, in the view of myself and my advisers, they are proposals which transgress the letter, or the principle of the bill of rights. I would imagine that if such advice were given in concrete form, cabinet would have the responsibility of making a judgment.
>
> But with respect to bills introduced into the house by private members, I would think there that under the word "ascertain" my only function, and surely a sufficient responsibility, is to ascertain, and then to advise the house that in the view of the Minister of Justice this bill does, or does not, conform to the bill of rights. And then would it not be for parliament to decide whether to proceed with it?
>
> **Mr. Lower**: I think that would be a very powerful opinion, if it were expressed by the Minister of Justice to the house; and the opinion of the minister would apply to regulations, every proposed regulation in draft form. Public bills, no doubt, would be hammered out before they were submitted, from that point of view?
>
> **Mr. Fulton:** Yes.

p. 334 [...] **Mr. Fulton**: Frankly, I did feel that the main responsibility was to advise the government, because, as you say, the great majority of bills that reach the statute books and have an effect on the public are bills introduced by the government.

Mr. Lower: Yes.

Mr. Fulton: Would it not be likely—and, indeed, not only likely; but almost certain—that with such a provision in the law, very early in the debate of a government bill somebody would ask the Minister of Justice whether he has examined this bill as required by section 4 of the bill of rights, and whether, in his opinion, it does conform to the bill of rights?

Mr. Lower: Almost certainly, in the course of years, you would work out a whole set of criteria which people would observe in drafting bills.

Mr. Fulton: Yes, that is my view. We may have to change; we may well be faced with the necessity of amending bills already on the statute book—and we are certainly going to have to look at every bill in the future to see that it conforms to the bill of rights. And this would be my special responsibility under clause 4.

[...] **Mr. Fulton**: I would have thought, during the debate on the bill. The appropriate stage, it seems, would be second reading, because that is when the principle comes up for debate. But it might be that in the course of years we would work out, either on our own, or by suggestion from others, a sort of formal report process under which the minister's opinion could be delivered at the same time first reading was moved. We might work out some procedure as that.

p. 335 [...] **Mr. Batten**: I am just saying, you would advise the house whether or not it was in accordance with the bill of rights?

Mr. Fulton: Yes.

[...] **Mr. Badanai**: [...] I would like to ask the Minister of Justice this question: if his opinion were overridden in the cabinet, what would be the attitude there—what would be the result?

Mr. Fulton: I think that would be one of those very difficult problems that no doubt do arise sometimes. There is the doctrine of collective cabinet responsibility, and whoever was the Minister of Justice at the time would have to decide whether he went along with the opinion of cabinet, that either his advice was wrong, or that under the circumstances he should accept the majority view. He would have to decide whether he would take that position—either one of those two positions,—or whether he would submit his resignation.

> p. 335 [...] **Mr. Fulton**: [...] You asked what would happen, and this is what we have not cleared up. The cabinet, of course, is the body which decides what bills will be introduced by the government, and what policy the government will follow, and its decisions are reached on a collective basis, under the doctrine of collective responsibility.
>
> Therefore, a minister of justice who found himself in the position of having advised his colleagues that, in his opinion, a bill runs contrary or counter to the bill of rights but whose advice was rejected by his colleagues, would have to make one of two fundamental decisions. He would have to conclude that he is wrong and that his colleagues are right, or that the exigencies of the situation require him to accept the collective view of the cabinet and therefore to go along with it or should he not be able to come to one of these conclusions, as a simple alternative, would have to be to resign. That would be the position as I see it."
>
> [Emphasis added.]

[144] Later, the Committee specifically considered the wording of section 4, which is the examination obligation. I notice the first proposal to create a body of expertise in regards to guaranteed rights. It is obvious this idea was acted upon much later with the creation of the Human Rights Law Section within the Department of Justice. Once again, I observe much debate over the wording and implications of the obligations. Mr. Maxwell Cohen and Mr. David Mundell were legal scholars, and Mr. Spencer (the Chairman), Mr. Martin, Mr. Browne and Mr. Deschatelets were parliamentarians.

> p. 393 [...] **Mr. Cohen**: "I now come to section 4. This section, as some people have pointed out, seems to be slightly weaker than the first draft of the bill, as the minister pointed out, and that the first draft had the phrase "to ensure". While "to ascertain" is the phrase here. You might ascertain whether any information here was inconsistent with the purpose of this act.
>
> It seems to me that there is really not much to choose between the two languages. I see no major difficulty if one uses the verb "to ascertain" because one cannot expect the Minister of Justice to administer these things. The courts are going to have to administer them.

There is a two-level process. First, there is the drafting process, where the minister will have his eye on it, and then there is the interpretation process, on which he will also have his eye for the purpose of seeing if further amendments are required.

But I would like to suggest that the two techniques for the consideration of the minister. I would like to suggest that if this bill is to do a serious job in the field of draftsmanship, and a serious job in the field of supervising what is happening, then I think the government should promise to establish, or attempt to establish a civil rights section, or some appropriately named section in the department, where the functions of drafting and supervision would go on, and would develop a body of expertise.

p. 406 [...] **Mr. Fulton**: Clause 4 affects the executive. This is a directive to the Minister of Justice, as a member of the executive, having the primary responsibility in this field. It is a specific direction to him, imposing upon him certain obligations with respect to ensuring that all subsequent bills and regulations decided upon shall be, in so far as they lie within the power of the minister to do it, in conformity with the bill of rights. When I say "in so far as they lie within the power of the minister to do it," I mean in so far as it is within his power, preserving still the principle that he is not a dictator over parliament, and that his powers are exercised subject to the overriding rights of parliament, and control by parliament of the executive. The scheme is as comprehensive as we can make it, not only with the respect to the field of rights, but with respect to all branches and parts of the government within the federal field of jurisdiction.

p. 510 [...] **Mr. Martin**: The Toronto bar had a submission on this article 4. They would retain the word "assure" in place of the word "ascertain" in the section. But it seems to me that section 4, as presently drawn, is really meaningless.

[...] Yes, and clause 4 really has no teeth in it. All he is going to do is to ascertain whether or not these things exist, and that is the end of it. There is no sanction, and there is nothing.

Mr. Mundell: This is very much the question which arose out of Mr. Badanai's suggestion. What powers could you give the minister if you were going to try to make it an effective section? He could not block a bill in the house. It seems to me that the section has a limited purpose, namely, that there should be a review made, and that it would rest on the conscience of the minister.

Mr. Browne: Would you not think from this clause that if the minister is instructed to ascertain something, and if he found something wrong, in that case it would be his responsibility to bring it to the attention of the house?

> **Mr. Mundell**: It would rest on the conscience of the minister, whatever he should do. The bill is based on the principle that the Minister of Justice would have a conscience.
>
> p. 512 [...] **Mr. Mundell**: I think it would be his duty under this section to form an opinion, but I do not think that opinion should be binding on parliament.
>
> **Mr. Deschatelets**: I am referring to a moral obligation.
>
> **Mr. Martin**: You will remember originally, in the bill introduced in 1959, the words were "in order to ensure", and now they have the word "ascertain" which, I think, weakens it to the point where this section is meaningless. It does not change the situation now. As Mr. Mundell said the minister now would be implicit in his responsibilities doing these things and this section does not change the picture at all. It seems to me there is great merit in the proposal made by Mr. Badanai.
>
> **The Chairman**: May I make this observation: I do not know how the Minister of Justice could ensure something—unless he has an opinion from the Supreme Court of Canada."
>
> [Emphasis added.]

[145] Minister Fulton also considered that a government may want to avoid the effects of the future *Bill of Rights* by invoking a "notwithstanding" provision:

> p. 573 **Mr. Fulton**: "[...] If at that time, the time the cabinet receives the minister's report, it feels that notwithstanding the indication that this bill is contrary to the bill of rights, nevertheless it should be proceeded with, because the interest to be served is so important that it warrants proceeding with it, then cabinet could only do that, as I see it, by inserting a clause which is contemplated in clause 3 of this bill, or the words: "notwithstanding the bill of rights the Senate and House of Commons enacts as follows". That would then make it clear this bill is being submitted to parliament for its approval, notwithstanding the bill of rights. The whole issue would be out in the open for parliament to assess.
>
> **Mr. Batten**: Agreed; but that does not add any strength or "teeth" to the bill of rights if, concerning every act you are going to bring in which contravenes the bill of rights, you are going to get over the hurdle by using the word "notwithstanding".

> **Mr. Fulton**: You cannot get over the hurdle unless parliament agrees it is appropriate to legislate this way, notwithstanding the bill of rights.
>
> [...] **Mr. Batten**: I think, Mr. Chairman, that this section of the bill, clause 4, could be strengthened because I do not think that giving the minister the authority to ascertain whether or not there is any contravention between the bill of rights and any proposed bill in the House of Commons is sufficient."

[146] It is also informative to note that at the time of these discussions, the role of the Department of Justice was contemplated. Minister Fulton described its responsibilities as follows and understood that the proposed amendments would call for more resources to be allocated to the Department:

> p. 575 **Mr. Fulton**: "The Department of Justice has certain responsibilities now, as you know, in respect of the drafting of government Bills and in respect of the drafting of any Regulations [...]. This imposes upon us in any event the obligation of ensuring that they are in conformity with the existing statutes and existing constitutional provisions. In addition, now, we will have the function of ensuring they are all in conformity with the Bill of Rights. To that extent it is not a change in our function; it is an extension of the basic application of our function. It may be that as this function develops, and as we have experience with it, that we will find we need to enlarge the personnel of the Department. [...] I do not think it would be wise at the moment to commit ourselves to the establishment of a special bureau."
>
> (Canada, House of Commons, *Minutes and Proceedings and Evidence of the Special Committee on Human Rights and Fundamental Freedoms*, 24th Parl, 3rd Sess, No 1 (20 July 1960) at 332–335, 393, 406, 510–512, 572–579.)

[147] As it will be seen later, major changes were brought within the Department of Justice in the 1980s following the proclamation of the *Charter* in order to espouse the examination and reporting responsibilities imposed on the Minister of Justice.

Part (2) -- August 1960 -- Minister of Justice Fulton (*Bill of Rights*)

[148] A few weeks after the Committee discussion, Minister Fulton summarized the state of the proposed examination clause as it stood. He also indicated that he understood the initial provision to imply a reporting obligation but that he had been convinced in committee that a formal reporting clause must be added.

> **Mr. Fulton**: "The next important amendment I think I should mention is with respect to clause 3 as it appears in the reprinted bill. This is the clause which imposes on the Minister of Justice the obligation of examining every proposed regulation submitted in draft form to the clerk of the privy council and every bill introduced in or presented to the House of Commons in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of that part of the bill.
>
> It was suggested to us in committee that while this might impose an obligation on the Minister of Justice to satisfy himself with regard to the existence or the non-existence of any inconsistencies, there seemed to be no concurrent obligation imposed upon him to bring his views by way of report before the House of Commons. [...]
>
> I felt it was an inescapable and necessary implication that in the regulations that the governor in council might make as to the manner in which and the means by which the Minister of Justice would discharge this obligation, the way in which the minister would report the results of his examination to the House of Commons or to parliament would also be covered. However, hon. Members felt that this specific obligation of reporting should be imposed upon the minister by specific provision in the bill, and since this seemed to me to impose no greater obligation than I thought was implicit in the clause in any event I felt there was no objection whatsoever to the insertion in the clause of a specific requirement that the minister should make the report to the House of Commons with respect to his examination at the first convenient opportunity."
>
> (Canada, *House of Commons Debates*, 24th Parl, 3rd Sess, Vol 7 (1 August 1960) at 7373)
>
> [Emphasis added.]

[149] As a result of all these discussions, the *Canadian Bill of Rights* formally became law on August 10, 1960. The discussions concerning clause 4 (now section 3) of the *Bill of Rights* reveal that the legislative intent was to insert, within the reviewing process of draft bills and draft regulations, a mechanism within the Department of Justice to identify and address inconsistencies with guaranteed rights. The discussions cited above also reveal that the reporting obligation of the Minister towards the House of Commons would be triggered if the Minister identified an inconsistency as a result of his examination. I also note that the role of the Department of Justice was discussed; this is an important indication as to what was expected of the Department. Furthermore, it seems that the Minister implicitly recognized that the role of the Department would grow with time.

Part (3) -- January 1971 – Minister of Justice Turner (*Statutory Instruments Act*)

[150] In January 1971, Minister of Justice Turner explained to the House of Commons the purpose behind the *Statutory Instruments Act*. The aim of the bill was to revise the law relating to delegated legislation. He indicated that the review was warranted as the last piece of legislation on the topic dated from 1950 and the *Official Languages Act* had recently come into force:

> **Mr. Turner**: "One of the main features of this bill is that it is designed to protect the public from the improper or unusual exercise of power that has been delegated by Parliament. This will be done in three different ways. First, most proposed regulations will be required to be submitted to the Clerk of the Privy Council who, together with Deputy Minister of Justice, will be responsible for examining the proposed regulations to ensure four things: first, that they are authorized by the statute pursuant to which they are to be made; second, that they do not constitute an unusual or unexpected use of the authority pursuant to which they are to be made; third, that they do not trespass unduly on existing rights and freedoms and are not, in any case, inconsistent with the purposes and provisions of the Canadian Bill of Rights; and fourth, that the form and

draftsmanship of the proposed regulations are in accordance with established standards.

[...] It is hoped that at this stage in the regulation-making process any proposed regulation that fails to meet the criteria which I have just enumerated will be revised in such a manner that, having regard to those criteria, it becomes acceptable to the Department of Justice and to the person or body that proposes it.

[...] At that stage the primary purpose will be to see whether the regulations meet the criteria. The ultimate interpretation, in one sense, lies with the scrutiny committee of Parliament. In a wider sense, the courts of this country will be called upon, if the regulation is challenged, to interpret whether the regulation is intra vires or ultra vires of the enabling statute. The interpretation of words will not be the primary purpose at this stage.

[...] There will be a change to the present system. There will be a judicial scrutiny by the Department of Justice to ensure that the four criteria are followed.

[...] It is my hope that the members of the scrutiny committee will be able to find the time to examine all regulations, but especially those that have wide application to the public. In this way, members of the public will be assured that Parliament is at least aware of those regulations which have an impact on their daily lives."

(Canada, *House of Commons Debates*, 28th Parl, 3rd Sess, Vol III (25 January 1971) at 2735–2736)

[Emphasis added.]

Part (4) -- February 1971 – Minister of Justice Turner (*Statutory Instruments Act*)

[151] A few weeks later, in February 1971, during a meeting of the Standing Committee on Justice and Legal Affairs, Minister of Justice Turner responded to the following comment:

"[...] it appears that the practice is not to report an inconsistency with the purposes and provisions of the Canadian Bill of Rights to Parliament, as provided for in the statutes, and the regulations made thereunder, but to continue to work with successive drafts of the regulations until the inconsistency has been removed. We have no fault to find with this technique, but the burden it imposes on the Department of Justice is considerable."

[Emphasis added.]

[152] To which Minister Turner responded:

> **Mr. Turner**: "The Committee says that the way the Regulations Act is drafted now requires the Minister of Justice to certify that a proposed regulation is in accordance with the Canadian Bill of Rights. What happens in practice? The Deputy Minister of Justice finds that a proposed regulation is contrary to the Canadian Bill of Rights, he sends it back to the department concerned saying we will not accept this, fix it up and it is fixed up and then it is certified.
>
> **Mr. Turner**: The amendment, instead of imposing the duty on the Deputy Minister of Justice or the Minister of Justice at the stage of a proposed regulation, says when the regulation is transmitted, that is to say after it has been approved, argued about, drafted and then sent over. In other words, the proper stage at which the Minister of Justice ought to certify it, is when it is transmitted for registration, not when it comes up by way of proposal. That is the only change. It is responsive to the Committee report and makes a lot more sense because in practice we send proposals back anyways until they come back in the proper form. Our duty should be to make sure that before registration it is in accordance with the Canadian Bill of Rights.
>
> **Mr. Alexander**: Will the regulations come before you sir? I do not even see the difference except where if there is any doubt about the validity of a regulation it is then transferred to your Department. Is that right?
>
> **Mr. Turner**: Yes. There are two different things, Mr. Alexander. The Deputy Minister of Justice under the earlier sections had the duty to ensure that the regulations met certain criteria. But the Minister of Justice under this clause has the duty to ensure that it does not contravene the Canadian Bill of Rights. In practice the Deputy Minister of Justice exercises that particular power on my authority but I am responsible before Parliament if he makes a mistake. As a matter of fact if there is a real dispute then the Deputy Minister of Justice draws it to my attention."
>
> (Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs on Bill C-182, Statutory Instruments Act*, 28th Parl, 3rd Sess (16 February 1971) at 7:22-7:23)
>
> [Emphasis added.]

[153] Similar to the intent behind the enactment of the *Bill of Rights,* as explored above, the purpose of the 1971 revision was also to elaborate a mechanism to examine draft provisions for inconsistencies with guaranteed rights. To do so, draft regulations would first be "judicially" scrutinized by the Department of Justice and second, if the regulation was then challenged, the Courts would assume their role to decide on the legality of the problematic provisions of the draft regulations.

Part (5) -- March 1985 – Minister of Justice Crosbie (Amendments brought after the enactment of the *Charter*)

[154] In March 1985, Minister of Justice John Crosbie commented on the government's responsibility to adapt existing legislation to the new *Charter*. As part of that process, both the *Statutory Instruments Act* and the *Department of Justice Act* were amended in order to include examination and reporting provisions similar to the ones created by section 3 of the *Bill of Rights*. It is important to note that the following segment refers to the review process as a whole and not specifically to the examination and reporting obligations.

> p. 3418 **Mr. Crosbie**: "[...] The federal Government, provincial Governments and territorial Governments, once the Charter had been proclaimed, undertook to review their legislation, regulations and administrative practices to ensure that they were consistent with the Charter as far as it could be determined. As a result of the review which has taken place in the Government of Canada, a broad range of federal initiatives were undertaken to bring about conformity with the Charter.
>
> p. 3419 [...] I want to point out that the project of reviewing federal statutes to discover if they comply with the Charter commenced on April 1, 1982. That is when the Human Rights Law Section was established in the Department of Justice. For over two years our predecessors were in charge of the operation of reviewing federal statutes to discover whether they complied with the Charter in so far as they could be determined. Of course, the courts will ultimately determine whether they do or do not comply.

> [...] What is the Bill about? The Bill is to ensure that federal statutes which are obviously in conflict with the Charter will be amended so that the conflict will no longer exist.
>
> p. 3422 [...] The Minister of Justice already has an obligation under the law to examine Bills and regulations to ensure they are consistent with the Bill of Rights. I am referring to the Bill of Rights enacted under the late great John Diefenbaker when his Government was in power. These amendments provide a similar obligation on the Minister of Justice to examine regulations and Government Bills to ensure they are consistent with the Charter. That is new. They also provide for the co-ordination of the examination of regulations under the Statutory Instruments Act, the Department of Justice Act and the Bill of Rights.
>
> [...] As a result of court decisions, in the future the House will have to make changes in legislation from time to time. We also recognize that there may be aspects of federal legislation that we missed in this review. It is a continuing process to ensure conformity with the Charter. New problems will be identified from time to time."
>
> (Canada, *House of Commons Debates*, 33rd Parl, 1st Sess, Vol 3 (27 March 1985) at 3418–3422)
>
> [Emphasis added.]

Part (6) -- April 1985 -- Minister of Justice Crosbie (Amendments brought after the enactment of the *Charter*)

[155] Minister of Justice John Crosbie further reiterated, in more categorical terms, the duties and obligations to be assumed by the Department of Justice in regards to reviewing pre-existing legislation at the Standing Committee on Justice and Legal Affairs on April 23, 1985:

> p. 25A-1 **Mr. Crosbie**: "Since the proclamation of the Charter in 1982, the federal government has been reviewing its legislation, regulations and administrative practices to ensure consistency with the Charter. This review was necessary because laws which are inconsistent with the Constitution may be found of no force and effect. The review has been based on the assumption that it is preferable to change legislation, rather than forcing Canadians to challenge laws in the courts to assert their constitutional rights.

> In order to carry out this review and provide advice generally on Charter issues, the Department of Justice established the Human Rights Law Section in 1982. The lawyers in this section have worked closely with the lawyers in the Legal Services Units, who in turn have consulted with officials in various departments and agencies to identify problems. In this way, the Department of Justice has been able to draw on those with expertise and specialized knowledge in many different areas.
>
> The review of statutes has been an enormous task. There are hundreds of laws covering an incredible variety of subjects. The Charter is relatively new and the jurisprudence is at an early stage of development. In most areas, there are no definitive court decisions. The task is further complicated because Charter assessment requires evaluation of fundamental issues of social policy, as an integral element of any legal judgment that can be made.
>
> p. 25A-8: [...] The amendments to the Department of Justice Act and the Statutory Instruments Act will provide for the scrutiny of bills and regulations to ensure consistency with the Charter. A similar obligation already exists with respect to the Canadian Bill of Rights [...].
>
> The amendments will also make this process more efficient by ensuring that an examination of regulations made under the Statutory Instruments Act will be sufficient for the purposes of the Charter and the Bill of Rights."
>
> (Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal affairs*, 33rd Parl, 1st Sess, No 25 (23 April 1985) at 25A-1 to 25A-25A-10)

[156] The examination and reporting duties of the Minister of Justice and of the Clerk of the Privy Council remain the same following these amendments except to add reference to the *Charter*; nothing else was changed.

[157] But, I heed that the verb "ensure", rather than "ascertain" was used by Minister of Justice Crosbie in his speech when he defined the obligations. It is impossible, at this stage, to clearly understand what was meant by Minister Crosbie's reliance on the verb "ensure": did he use "ensure" in its weakest form, as seen earlier when the word was tempered by the much weaker

French equivalencies; or did he mean to convey the strong definition of "ensure", as found in dictionary definitions? Ultimately, the legislative history of the *Statutory Instruments Act*, as presented to the Court, establishes that no amendments were sought to the examination provisions in order to reflect his use of "ensure".

Part (7) -- June 1985 -- Mr. Low (Application by the Department of Justice)

[158] Finally, in June 1985, in front of the Standing Senate committee on Legal and Constitutional Affairs, Mr. Martin Low, as General Counsel within the Department of Justice – Human Rights Law Section, commented on the proposed legislation to amend certain bills following the enactment of the *Charter* as mentioned by Minister Crosbie in March and April 1985 (see above). He incidentally summarized the practical complexities of the examination provisions. He first detailed how the Department of Justice approaches such an issue:

> p. 15:6 **Mr. Low**: "[...] I just want to say that complicating our life, apart from the question of novelty, is the fact that the Charter requires of us more than a narrow examination of precedents and judicial decisions that enable us to say, with a degree of confidence about black letter law, that something does or does not conform to the Charter. It has a very important policy dimension. A number of aspects of the Charter involve policy judgments as much as pure black letter legal prescriptions and so that the task of assessing the compatibility of laws with the Charter becomes, in many respects, a matter of judgment and of risk assessment, as opposed to clear and definitive and articulated decisions a determination of inconsistency.
>
> The bill that will be coming before you is, in a sense, our best judgment as to areas of legal risk. There are very few areas in the bill that we believe to be directly in conflict with the Charter. We have some difficulty in saying absolutely, unequivocally, that such and such a provision of a certain Act, in fact, is inconsistent with the Charter. But, we see a degree of sufficient risk of invalidity that one of our operating principles, in conducting the review, requires us to consider it for amendment. The operating principle is, where the risk of inconsistency with the Charter is sufficiently great, that we should not

> be in a position of requiring individual Canadians to test an issue through the courts to the final level of the Supreme Court, with all the expense and difficulty that that entails, where we recognize that there is a high risk of inconsistency."
>
> [Emphasis added.]

[159] Mr. Low then informed the Committee that the bill would add a reference to the *Charter* to the existing examination provisions:

> p. 15:8 **Mr. Low**: "[...] The next area of the bill is an area which involves the casting of a responsibility on the Minister of Justice to examine bills and regulations to ensure that, when Parliament is dealing with a bill, there has been an assessment made of its compatibility with the Charter. That is essentially similar to the responsibility which the minister now has under the Canadian Bill of Rights. It is also intended to make the process of examination of regulations under the Statutory Instruments Act somewhat more efficient than it is at the moment, where those who are charged with the administration of this responsibility for the minister must in fact examine the regulations at least twice and sometimes three times in some cases, essentially for the same purpose, and it is really not a very productive use of the time of some very valuable people.
>
> [...] That is a very hasty assessment of what is in the bill. I suppose I should say the bill is not intended to be our final product. It is the first of what will be at least two bills and perhaps more, because as time goes on our understanding of the Charter and of its impacts on areas of law that we may have assessed and thought to be on balance pretty secure, is being revised every day. Perhaps the best example I can give you of that is the provisions of this bill which deal with powers of entry for the purpose of search. Immediately after the judgment of the Supreme Court of Canada in *Hunter v. Southam* we were able to deal with much more confidence than we had to that point in time with this rather difficult question of controls on those who would search for the purposes of an offence.
>
> p. 15:9 [...] I suspect that we will be doing that more and more frequently as the higher courts, and particularly the Supreme Court, come to give us better guidance on the meaning of these difficult questions of law and perhaps even more difficult questions of social policy."
>
> (Canada, Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 33rd Parl, 1st Sess, No 15 (12 June 1985) at 15:6-15:9)

[Emphasis added.]

[160] From this broad contextualization, in the next section, I reach conclusions regarding the legislator's intent in regards to the examination provisions.

C. Conclusions on the Legislator's Intent

Part (1) -- Summary

[161] To summarize this analysis of the legislator's intent, I conclude that the Minister of Justice's obligations to examine and to report have existed since the early 1960s. These obligations have evolved over time, notably through the full review of delegated legislations in the early 1970s resulting in the *Statutory Instruments Act*, and through the amendments consequent to the enactment of the *Charter* in the 1980s. The basic requirements of the obligations have remained the same but the work required to fulfil the obligations and the complexity of the substantive issues have greatly expanded. From the historic statements reproduced above, I confirm that it was agreed that changing the word "ensure" for "ascertain" weakened the examination process.

Part (2) -- The Examination Duty

[162] The objective of Minister Fulton was to impose on the Minister of Justice the obligation to answer whether or not there was a breach to guaranteed rights. The legislative language adopted does indeed call for this determination to be made. But, at no time was there discussion as to the level of credibility to be given to an argument in order to permit such an answer to be

reached. The use of the word "ensure" was first proposed, but following discussions the word "ascertain" was deemed more appropriate.

[163] At the time, the Department of Justice was not organized to examine draft legislation. The idea that the Department of Justice would assume such a responsibility was only in its embryonic stage, but the persons involved in the discussions at the time envisioned that the responsibility of the Department of Justice would gradually grow.

[164] In regards to the bill of the *Statutory Instruments Act* in 1971, Minister of Justice Turner, when discussing the draft *Statutory Instruments Act*, wanted to protect the public and ensure Parliament would have a role to play in reviewing regulation compliance with guaranteed rights. He envisioned that the Department of Justice would assume a "judicial scrutiny" of the draft regulations. He also made it clear that if called upon, the Courts would have the final say as to legality and compliance with guaranteed rights. In essence, he placed emphasis on the roles to be assumed by the three institutions in attempting to produce the best regulations possible.

[165] Following the enactment of the *Charter*, in 1985, Minister Crosbie used the word "ensure" in his statements. I note that the word "ensure" was in fact never reflected into the legislation through an amendment; the verb "ascertain" remained. It can be said that the weak form of the verb "ensure" was used because the French counterparts to "ensure" are "vérifier" in the *Bill of Rights* and the *Department of Justice Act*, and "examiner" in the *Statutory Instruments Act*. In addition, the expression "does not trespass unduly", in French "n'empiète pas indûment", used at 3(2)(c) of the *Statutory Instruments Act* further confirms that the notion of certainty

found within the word "ensure" has been diluted. In every scenario where "ensure" was used, whether through comparisons of equivalent expressions in different statutes, in the correspondent French versions of the provisions, or through historical discussions, the guarantee within the expression "ensure" was always mitigated.

[166] Furthermore, Minister Crosbie's general counsel, Mr. Low, expressed the complexities of the new role the Department of Justice would assume. Mr. Low also articulated that it would be challenging to "[...] say with a degree of confidence [...] that something does or not conform to the Charter [...]." From these complexities, the "no reasonable argument" standard was adopted.

[167] The objective of establishing an examination process in regards to guaranteed rights was clearly intended. But, at no time was it thought that this process would guarantee *Bill of Rights*-proof and *Charter*-proof draft legislation. It was intended to give the Department of Justice a major participatory role in that examination process, to the point of assuming a role of judicial scrutiny. It is only in the early 1980s that the "no reasonable argument" standard was conceptualized. Following the enactment of the *Charter*, that standard evolved into the "credible argument" standard.

[168] Overall, the intent of the legislator, as early as the 1960s and through to the 1980s, was consistent and properly reflected in the ordinary meaning approach. The intent supporting these enactments and subsequent amendments cannot be changed on the basis that a Minister of Justice, in 1985, referred to the verb "ensure" rather than "ascertain" to describe the obligations.

Such a conclusion would not reflect the collective intent established over 25 years of legislative discussions.

Part (3) -- The Reporting Duty

[169] The early draft of the *Bill of Rights* did not contain a reporting mechanism; it came about later following discussions in Parliament. The reporting mechanism was added in order to ensure that there would be finality to the examination procedure. At no time were Parliament's responsibilities in regards to protecting guaranteed rights discussed.

[170] Following the Minister's duty to examine, the legislator also intended to create a reporting obligation to ensure that the Minister of Justice would report to the House of Commons if ever an inconsistency with guaranteed rights was identified.

[171] The ultimate result of the duty to report, the Minister of Justice's resignation from Cabinet, was conceptualized to be of a political nature by Minister Fulton. At the time, this remedy was considered a significant tool of persuasion and remained so for the years to come.

[172] Over this entire period, up to today, there has only been one report filed to the House of Commons by the Minister of Justice in application of the examination and reporting duties. The report, on a Private Member's Bill and thus outside the purview of the examination provisions, concluded that an amendment was inconsistent with the presumption of innocence. This inconsistency was corrected at the committee level through an amendment (Canada, House of

Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Agriculture*, 30th Parl, 1st Sess, No 63 (18 November 1975) at 19-27).

[173] It is important to note that Cabinet deliberations are fully protected for a period of twenty years as per section 39(4)(a) of the *Canada Evidence Act*, RSC 1985, c C-5, meaning that even if the Minister of Justice resigned, she would not disclose, at least theoretically, the reasons for doing so. Yet, the framework provides for such a measure; thus this eventuality must be considered.

VII. ANALYSIS STEP 3 – CONSEQUENCES OF THE PROPOSED INTERPRETATION

A. Defining What Is the Obligation

[174] Our analysis of the plain meaning of the text and of the legislator's intent provides a sound foundation for understanding exactly what are the Minister's obligations in relation to the examination function.

[175] The Minister of Justice is required to examine and analyze any draft legislation, to find any inconsistency, and to conclude in no uncertain terms that the eventual Court challenge will result in a conclusion that the draft legislation will be found in breach of one or many of our *Charter* rights.

[176] The obligation to examine is completed at the time the bill is tabled into the House of Commons and requires looking at the facts that exist at that moment. The examination provisions do not ask the Minister to consider hypothetical outcomes or shifting social norms.

[177] The examination requirement forces the Minister of Justice to conduct a robust review of the clauses of draft legislation. The objective is to make the legislation defendable in Court insofar as guaranteed rights are concerned. This examination duty is demanding and can only improve the quality of draft legislation if indeed there is an inconsistency, or the appearance of an inconsistency, while the legislation is under development.

B. What the Obligation Does Not Entail

[178] The plain meaning and the legislator's intent do not ask the Minister to guarantee consistency looking forward (for example to anticipate a far-away court challenge), nor do they ask the Minister to guarantee that proposed legislation is more likely than not consistent with guaranteed rights. The obligation is to make a thorough search for inconsistencies and to report only if no credible argument can justify the inconsistency.

[179] For a Minister of Justice to reach a conclusion that an inconsistency exists, there must be no valid and substantial argument to support a different conclusion. A different conclusion would be that indeed, a credible argument does exist in favour of the proposed legislation. To reiterate, there can only be an inconsistency if no credible argument exists. Therefore, if there is a credible

argument to be made in favour of consistency, there is no inconsistency, hence the duty to report is not triggered.

[180] The plain meaning and the review of the legislator's intent leading to the enactment of the examination provisions do not support the conclusion that the Minister of Justice must identify any inconsistency that may impact on guaranteed rights and automatically report on it. Rather, the Minister must indeed identify inconsistencies, but only report if there is no credible argument to be made in favour of justifying that inconsistency. As laudable as the first option is in theory, the wording of the examination provisions simply do not reflect that meaning.

[181] To support such an interpretation, it is important to place this examination process into proper perspective by describing the exact role each branch of our Constitution has to play and how each of them have to assume their respective responsibilities. Describing the role of each branch will also help explain the evolution of the examination process within the Executive, more specifically within the Department of Justice.

[182] It is well recognized that context gives perspective and a global viewpoint. It plays a decisive role in understanding the interpretation that must be given to statutes.

VIII. ANALYSIS STEP 4 – CONSTITUTIONAL AND INSTITUTIONAL CONTEXT

A. Introduction

[183] Our overarching goal for this chapter will be to give colour to the context in which the examination and reporting duties of the Minister of Justice operate. I will show that the internal context in which the Department of Justice executes the examination obligation properly reflects the wider external institutional and constitutional contexts. The following chapter will be divided into three major parts, one for each branch of government: (1) the Judiciary, (2) the Executive, and (3) the Legislator.

[184] Contrary to the brief factual exploration of the characteristics of the three branches in the first section, which aimed to situate the Plaintiff's case, this chapter will instead delve into the practical roles and responsibilities of the three institutions. I will analyze the theoretical aspects of each, and often contrast theory with practical realities. Ultimately, I aim to distinguish each branches' responsibilities from that of the others and to determine whether the outcome of this analysis supports or contradicts our findings in relation to the content and performance of the Minister's examination and reporting duties.

[185] As expressed previously, in *Bell ExpressVu*, giving colour to the context in which the Minister's duties operate essentially means that a pure narrow legislative interpretation based on the plain meaning and on the legislator's intent is not enough. Context, in this case, is not simply a wider statutory scheme; it is rather context in its widest possible constitutional scope.

[186] The examination provisions must be assessed light of what they represent within the founding principles of constitutional monarchy and of democracy. The roles and duties of each branch cannot be treated as separate statutory schemes operating disjointedly from each other. Our Constitution provides for the creation of three institutions that are, in essence, the expression of our Canadian democracy at play. In the following paragraphs, I will look more specifically at the roles these three institutions play in order to give a certain colouring, a certain perspective one could say, to the role of the Minister of Justice. I will find that they all have a vital role to assume in identifying potential inconsistencies in draft legislation and in attempting to neutralize them.

B. Section 1 – The Judiciary's Role

Part (1) -- General

[187] The first branch I will analyze is the Judiciary, whose function is assumed by different national and provincial Courts. In short, the Courts are called upon to render justice on a daily basis in accordance with their fields of responsibilities. As part of this duty, if asked, the Courts will determine whether or not a law is in accordance with the *Charter* and the *Bill* of *Rights*. The Supreme Court of Canada is the final court of appeal and its decisions are binding across the entire nation.

[188] The role of the Judiciary is not as much at issue in this case as the two other branches, although as we will see, the balance struck between the three branches is extremely relevant. To fully understand the constitutional context of the case, we must still consider the Judiciary's role

in interpreting legislation and in ultimately deciding if legislation is compliant with guaranteed rights.

[189] Professor emeritus Peter W. Hogg wrote, in one of his numerous publications on the *Charter*, that as important as Supreme Court decisions are, it is the collectivity of our three constitutional institutions that are the ultimate protectors of our guaranteed rights:

> "The *Charter* will never become the main safeguard of civil liberties in Canada. The main safeguards will continue to be the democratic character of Canadian political institutions, the independence of the judiciary and a legal tradition of respect for civil liberties. The *Charter* is no substitute for any of these things and would be ineffective if any of these things disappeared." (Peter Hogg, *Constitutional Law of Canada*, 5th ed, vol 2 (Scarborough: Carswell, 2007) at 36)

[190] This global perspective must be kept in mind when discussing the Minister of Justice's role in ascertaining whether or not there is an inconsistency in any draft provisions with guaranteed rights. Such a perspective gives whoever must interpret legislation the proper context with which to colour the duties of the Minister.

Part (2) -- International Comparisons

a) *Overview*

[191] The Judiciary's ability to invalidate laws developed by the Executive and passed by the Legislator is a key factor in maintaining balance between the roles and responsibilities of each branch. After thoroughly studying Prof. McLean's expert report regarding international systems of checks and balances, I can conclude that Canada's system favours "post-enactment" review.

This means that Canada's system of checks and balances is designed to accept less stringent checks before the legislation is enacted because we have a strong system of checks post-enactment compared to the other systems analyzed by Prof. McLean. Canada is a relatively unique outlier within the Commonwealth where the Judiciary can strike down laws it finds non-compliant with guaranteed rights and require responses from both the Executive and the Legislator.

[192] Prof. McLean's report specifies that Canada was the first Commonwealth country to create a regime to ensure draft legislation is reviewed for compliance with defined rights prior to presentation to the law-making body. She indicates that in each country analyzed, the legislature ultimately has the last word in deciding whether a provision will stand or not. Through tools and methods, regardless of the Judiciary's analysis of a provision, the legislatures in all countries analyzed have the means to enact legislation of their choosing. For example, regardless of a court's finding of invalidity, a legislature can use a notwithstanding clause (ex: Canada) or simply refuse to address a declaration of invalidity (ex: Australia). Prof. McLean refers to this model of human rights protection as "weak form judicial review".

[193] She explains that in this model, "courts contribute to assessing whether legislation complies with human right obligations but do not necessarily have the last word". Accordingly, mechanisms exist to encourage legislatures to seriously consider the impact of bills on rights. Prof. McLean concludes that the balance struck between "pre-enactment" systems of verification (ex: bills must be approved by a Human Rights Committee) and "post-enactment" systems of verification (ex: court declares the law invalid) vary dramatically from jurisdiction to

jurisdiction. As such, she observes that the balance between legislative and judicial supremacy appears to be linked "to the degree to which it is the court or the legislature which in practice has the last word".

b) *New Zealand*

[194] First, in New Zealand, prior to introduction into the House of Commons, bills are submitted to the Cabinet Legislation Committee. The sponsoring Minister (not necessarily the Minister of Justice) is required to certify that he has complied with the Legislation Advisory Committee guidelines and the Cabinet Office guidelines.

[195] In New Zealand, the reporting duty is upheld by the Attorney-General. The Attorney-General "is the first law officer as well as a Minister of the Crown. Typically, the Attorney-General is a member of Cabinet." The author also notes that in practice, the decision to report is ultimately a matter for the personal judgment of the Attorney-General.

[196] Interestingly, Prof. McLean notes: "In recent times it has been thought inappropriate for the New Zealand Attorney-General to also hold the office of Minister of Justice but nevertheless she often finds herself playing multiple roles as a political member of the government of the day, as the Crown's primary legal advisor and as a Member of Parliament."

[197] Prof. McLean indicates that "despite the absence of any legislative requirement to do so, section 7 reports [consistency with the *New Zealand Bill of Rights*] and their reasoning, and even advice which does not lead to a section 7 report being given, is usually made public. [...] They

are published in the Appendices to the Journal of the House of Representatives when a Bill appears to be consistent [McLean's underlining] with the *Bill of Rights Act*. However, the practice has evolved that where a Bill appears to be consistent with the *Bill of Rights Act*, the Ministry's and the Crown Law Office's advice to the Attorney-General is usually published on the Ministry's website (from 2003) effectively waiving any claim to legal privilege and also informing parliamentarians and the greater public."

[198] As a side note regarding judicial scrutiny, Prof. McLean mentions there has been a question of whether the Attorney-General's political role is an executive or a parliamentary one. If the role of the Attorney-General stems from the Executive branch, the Attorney-General would be protected from judicial scrutiny under article 9 of the *New Zealand Bill of Rights 1688*. This topic was broached in a New Zealand Court of Appeal decision named *Boscawen v Attorney-General*, [2009] 2 NZLR 229 at paras 15, 21, in which the decision of the Attorney-General not to issue a consistency report was challenged. The Court found that even though it was arguable that the Attorney-General's duty to report was undertaken as a member of the executive, as a law officer, and as a member of parliament, the reporting role of the Attorney-General is part of the legislative process and therefore covered by the principle of comity. Comity, to my understanding, is simply respect for separation of powers. Therefore, the Attorney-General's discretion not to file a report could not be judicially reviewed.

[199] Prof. McLean explains that the Court of Appeal found that the duty to report's function is to inform political debate in Parliament and aid the legislative process. The objective of the duty to report, in New Zealand, is to ensure Parliament has the benefit of the Attorney General's

assessment. From the *Boscawen* case at para 20: "There may be room for different views, but the view which Parliament is to be provided with under section 7 [duty to report] is the genuinely held view of the Attorney-General, whether others consider that view right or wrong." Finally, Prof. McLean suggests that "[p]olitics tends to govern whether bills are moderated during their passage, or repealed after there is a change of government."

[200] In regards to the judiciary's power to intervene when a court finds that rights have been infringed upon, the New Zealand judiciary has no express power to do so. Prof. McLean notes some judges have suggested that they may have the power to make a "declaration of inconsistency" which would draw attention to the extent to which a provision fails to meet human rights standards. There is no equivalent to section 33 of the *Canadian Charter* [notwithstanding clause]; therefore, impugned legislation survives regardless of the judiciary's opinion of it. Prof. McLean submits that, in New Zealand, pre-legislative processes are commonly the only place where human rights will formally be considered. As the courts cannot grant any useful remedies, litigants are loath to make arguments regarding the consistency of the law. Thus, the importance of the reporting obligation in New Zealand justifies the "proportionality approach" and not the "manifest inconsistency approach" (as in Canada).

c) *United Kingdom*

[201] Second, in the United Kingdom, the Minister in charge of the bill, rather than the Attorney-General, is tasked with assessing the "compatibility" of the bill with the rights and freedoms protected by the *European Convention on Human Rights*. The assessment is completed upon the introduction of the bill to Parliament. Prof. McLean, quoting Prof. David Feldman on

internal guidance in pre-legislative compatibility, explains that the Minister "must be satisfied that the balance of arguments favours the view that the Bill is likely to survive Convention scrutiny in the Courts". Prof. Feldman suggests this practice operates as a "51 per cent probability test". Prof. McLean suggests that "in other words this is the place in which Ministers and legislatures are given some leeway to make their own assessments of credibility".

[202] Statements of compatibility or incompatibility, in the United-Kingdom, are reproduced in the explanatory notes to bills when they are introduced. These notes also contain "a very general indication of reasons [...] On occasion a Bill has been accompanied by a separate more detailed memorandum on its human rights implications [...]."

[203] Prof. McLean further explains that United Kingdom courts are empowered to "make a declaration of incompatibility in relation to legislation which does not meet Convention standards but such a declaration does not render the statute invalid or unenforceable and neither is it binding on the parties". Furthermore, if litigants have exhausted domestic remedies, they may take the case to the European Court of Human Rights in Strasbourg. The European Court of Human Rights cannot invalidate United Kingdom legislation but it is able to grant certain remedies such as damages.

[204] In the United Kingdom, there is no formal legislative override procedure or the equivalent of a section 33 notwithstanding clause under the *Canadian Charter*. On this, Prof. McLean notes that in almost all cases, a declaration of invalidity by the courts will prompt political dialogue leading to amendments.

d) *Australia - Australian Capital Territory [ACT]*

[205] Third, Prof. McLean explains that the ACT model requires both negative and positive written statements of compatibility to be made by the Attorney General. Reasonable limitations "may be placed on a human right where this limitation 'can be demonstrably justified in a free and democratic society'". The relevant factors used to determine whether a limitation is proportionate are: the nature of the right protected, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means available to achieve its purpose.

[206] Prof. McLean notes that there has been controversy in ACT about the availability of the Attorney General's record of his or her reasoning. The Legislative Assembly Scrutiny Committee has the most impact in assuring human rights are taken into account during the legislative process. The Legislative Assembly Scrutiny Committee reports to the Legislative Assembly about human rights issues raised by bills presented to the Assembly. Prof. McLean notes that the Legislative Assembly Scrutiny Committee frequently disagrees with the Attorney-General's assessment. However, the Attorney-General's failure to comply with the reporting obligations does not affect the validity, operation or enforcement of any Australian Capital Territory law.

[207] The Supreme Court of Australia is empowered to grant a declaration of invalidity but this does not have the effect of invalidating the law or rendering it ineffective. Instead, it "sets out a process by which the Assembly is notified and can respond in such situations. The Attorney

General must present the declaration to the Legislative Assembly within six days and provide a written response to the declaration of incompatibility within six months."

e) *Australia – Province of Victoria*

[208] Fourth, in the Australian province of Victoria, a Member of Parliament who proposes to introduce a bill into the House of Parliament must ensure that a statement of compatibility is prepared in respect of that bill. To do so, the Member of Parliament may consult resources from the Human Rights Unit and obtain legal advice from the Attorney General. The statement of compatibility must state whether, in the Member's opinion, the bill is compatible with human rights or not. If the Member deems it compatible, he must state why. If, in the Member's opinion, any part of the bill is incompatible with human rights, he must state the nature and the extent of the incompatibility, but the statement is not binding on any court or tribunal. A failure to comply with the reporting obligation does not affect the validity, operation or enforcement of the legislation or of any other statutory provision. It should be noted that although it is the Member of Parliament who causes the report to be created, and afterwards presents it to the House of Parliament, it is the Minister of Justice who is responsible for developing the statement of compatibility.

[209] Prof. McLean explains that Parliament clearly retains power to override the *Victorian Charter of Human Rights and Responsibilities* through an express declaration. If the override provision is used, the member must make a statement to the Legislative Assembly explaining the exceptional circumstances that justify the override. The override declaration expires after five years. If the override declaration is used, a statement of compatibility is not required.

[210] Prof. McLean illustrates that in practice "statements of compatibility routinely consider not only whether rights are engaged but whether the limitations on such rights are reasonable". She further explains that the Human Rights Unit in the Australian Department of Justice uses a two-stage test whereby first, a right is defined and, second, the right is subjected to a reasonable limits test. Essentially, a version of the Canadian *Oakes* test (see *R v Oakes*, [1986] 1 SCR 103) is adopted: "[t]he Minister must describe the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve the purpose that limitation seeks to achieve". If the bill or part of the bill is incompatible according to this test, the Member introducing the bill must state and explain how it is incompatible and why he or she wishes to proceed nonetheless.

[211] Prof. McLean notes that the *Victorian Charter* is more rigorous than the Australian Capital Territory mechanism explored earlier. The Victorian model requires "statements of compatibility to demonstrate the government's reasoning and not take the form of a mere assertion". Furthermore, statements of compatibility are developed through political and legal processes. As with the Australian Capital Territory model, all bills are reviewed by a scrutiny committee, in this case the Scrutiny of Acts and Regulations Committee. Prof. McLean notes that the Scrutiny of Acts and Regulations Committee frequently disagrees with the Minister's assessment of compatibility although this has not always resulted in amendments to the contested provisions. Statements of compatibility and the responses of the SARC and of the Ministers to them are publicly available.

[212] Prof. McLean deems the Victorian model "very dialogic" as it "multiplies the sites for and seeks to enhance the quality of legislative debate surrounding human rights compliance". If the judiciary finds that a provision is incompatible with human rights, it may make a "declaration of inconsistent interpretation" to which the Minister must table a written response. It will then be up to Parliament to decide what action, if any, to take.

f) *Australia – Commonwealth of Australia (Federal Level)*

[213] Fifth and finally, Prof. McLean explains that the reporting obligation for the Australian Federal level is a purely parliamentary process governed by statute. Similar to the Victoria model, the relevant statute provides that a Member of Parliament who proposes to introduce a bill must ensure a statement of compatibility is prepared and afterwards tabled. The statement of compatibility must include an assessment of whether the bill is compatible with human rights. The statement is not binding on any court or tribunal and failure to comply does not affect the validity, operation, or enforcement of the subsequent law.

[214] Human rights compatibility, uniquely, is assessed against seven core human rights treaties to which Australia has acceded. Prof. McLean notes that there is no prescribed form for the statements of compatibility but the Attorney General's department provides a template, assessment tools, and guidance sheets. Bills go to a standing Parliamentary Joint Committee on Human Rights that has jurisdiction to examine legislative instruments for compatibility with rights. As this mechanism is a recent creation (introduced in 2012), Prof. McLean states that it is still unclear what approach the courts will take in response.

Part (3) -- Conclusion on the Judiciary's Role

[215] This international comparison demonstrates that jurisdictions balance their systems of checks and balances differently. Through the five examples explored by Prof. McLean, I can conclude that jurisdictions all adopt some form of examination, reporting and review mechanisms, although many theoretical and practical differences exist between them. The unifying factor, in my opinion, is that there exists a balance of power between the different branches of government in regards to identifying inconsistencies and dealing with them. Some jurisdictions choose to favour "pre-enactment" protections against inconsistencies, such as mandating that all bills must be scrutinized by a non-partisan committee that reports to Parliament. Others choose to favour "post-enactment" protections against inconsistencies, Canada being a strong example: only Canadian courts have the power to invalidate legislation and require responses from the other branches compared to the countries analyzed by Prof. McLean.

[216] As such, when analyzing the appropriateness of the standard applied, whether it be the "credible argument" or the "more likely than not inconsistent" standard, the context in which the Canadian model operates is coloured by the roles our institutions are called to play. Prof. McLean's report on other international models allows us to better grasp exactly what equilibrium of checks and balances between institutions Canada strikes.

[217] In sum, I notice that no jurisdictions have both extremely strong "pre-enactment" protections and "post-enactment" protections. Rather, it seems as if the principle of separation of

powers is reflected through a balance of methods protecting against inconsistencies: in some jurisdictions, the Executive and the Legislature hold a greater share of responsibility in promoting inconsistency-free legislation; in others, it is the Judiciary who holds the lion's share of responsibility in that regard. In Canada, our constitutionally mandated separation allows more flexibility to the Executive in regards to guaranteed rights because the Courts are mandated with a larger safeguarding role than in other jurisdictions.

[218] Having situated the Legislator's powers and responsibilities, I will now move on to the role of the Executive within our larger institutional framework in order to further colour the context in which the examination provisions operate.

C. Section 2 – The Executive's Role

Part (1) -- Structure of the Executive

a) *Cabinet*

[219] The executive function is assumed by the Prime Minister. The Prime Minister is the leader of the party for which the most Members of Parliament were elected. The Prime Minister selects among the members of his party persons who are called upon to become Ministers of the Crown. In those capacities, the Prime Minister and his Ministers, collectively known as the Cabinet, are responsible for the administrative operational requirements of the country.

[220] Cabinet is responsible for establishing policies and issuing appropriate administrative guidelines. In every new session of Parliament, Cabinet is called upon to prepare the Speech from the Throne, which usually contains the priorities of the government for the upcoming session. The legislative agenda that the government intends to pursue is typically one of the priorities announced. From that list of priorities, Ministers will know what is expected of them when relevant bills are tabled into the House of Commons by the Leader of the Government in the House of Commons.

b) *Cabinet Confidences and the Resignation of the Minister of Justice*

[221] As per the *Canada Evidence Act*, above, discussions at the Cabinet Table are protected confidences of the Queen's Privy Council for Canada for a period of twenty years. This means that whatever is discussed within Cabinet cannot be made public. Such confidences relate to: Memoranda to Cabinet that contain proposals or recommendations, discussion papers that may contain background information, analysis of issues, policy options suggested to Cabinet, agendas and records of deliberations and decisions, records containing discussions of Ministers made or to be made including the formulation of government policy, records relating to briefings of Ministers on matters to be discussed or previously discussed at Cabinet, and draft legislation. This protection relates not only to matters dealt with at the Cabinet Table but also with matters involving Committees of Cabinet (*Canada Evidence Act*, above, at subsections 39(1), 39(2)(a), (b), (c), (d), (e), (f) and 39(3)).

[222] Cabinet Confidences prevent not only outside persons from accessing the information but also impose on the participants themselves the obligation not to disclose the content of the

information in a public forum. Notably, Cabinet Confidences bind both civil servants and Ministers of the Crown.

[223] This concept is particularly interesting in application to the case at hand because protected confidences may severely limit the content of the Minister of Justice's communications if she ever were to consider resigning as a result of a disagreement with Cabinet in regards to an inconsistency with guaranteed rights she has identified. Minister of Justice Fulton, in the early 1960s, at the time of discussion on the enactment of the *Bill of Rights*, saw ministerial resignation as a powerful tool. But it may be that the impact of such a resignation would in practice be much more mitigated than Minister of Justice Fulton envisioned. The effect of protected confidences on the Minister of Justice's option to resign if she ascertains an inconsistency is profound. Yes, resignation may be the ultimate decision to make if Cabinet and the Minister of Justice disagree, but resignation does not guarantee that an informed public debate on the inconsistencies will occur as the Minister of Justice will be unable to discuss her resignation. As seen, even draft legislation is protected; this emboldens the notion that the Minister would be unable to communicate even the cause of her resignation. Furthermore, it is entirely possible that a subsequent Minister of Justice, who is not of the same opinion as his ex-colleague, may accept to present the bill to the House of Commons without a report.

[224] Ultimately, the Minister of Justice's resignation may be a persuasive tool at the Cabinet Table; but in practice, the threat of resignation would most likely minimally foster public debate, as the causes of the Minister's possible resignation would not be communicable to the public. Political debate may occur if the Executive wishes to publicize the disagreement and to discuss

the issue without relying on specific protected Cabinet information. Politics may permit limited debate, but not to the extent of a full-fledged, public, informative debate on guaranteed rights.

c) *Role of the Minister of Justice*

[225] Each Minister of the Crown, depending on the priorities established by Cabinet, will normally have legislative work to assume. This work will involve the Minister of Justice and the Department of Justice in their role of examining draft legislation in light of our guaranteed rights.

[226] Pursuant to section 4 of the *Department of Justice Act*, the Minister of Justice wears many hats: she is the official legal advisor of the government on the administration of public affairs in accordance with the law, the superintendent of all matters dealing with the administration of justice within Canada to the exclusion of provincial responsibilities on such matters, and the legislative advisor for government bills.

[227] When assuming that legislative role, the Minister of Justice and her department will examine any bills originating from a Minister of the Crown. This examination is performed before a bill is introduced in the House of Commons but it may also be performed afterwards, notably in the case of amendments.

[228] The following section will repeat some of the facts described in the first section of this decision, notably on the structure of the Department of Justice and the steps a bill undergoes before becoming law. It is also based on the evidence filed by the parties detailing the processes followed within government. Properly understanding the roles and responsibilities of each gear

in the machine is an important key to fully grasping how the examination provisions are actualized. The repetition is worth the cognitive effort. Contrary to the first section, which aimed to be descriptive, this section will analyze whether the internal verification system of government functionally deters inconsistent legislation from being presented to the House of Commons. In short, is the system of examination such that inconsistencies are truly and systematically mitigated or eliminated as the Defendant argues?

Part (2) -- Process before a Bill is introduced in the House of Commons

[229] Before a bill is introduced in the House of Commons, it will have been the subject of numerous discussions, of the result of policy development and policy options, and also of the legislative drafting process. Department of Justice lawyers, in these early stages, are involved in all facets of these processes by actively participating and exchanging information. They discuss the policy options available and continually advise the client of their ongoing concerns, all the while helping the client attain its policy objectives and while operating within their constitutional boundaries.

a) *Department of Justice*

[230] In order to ultimately introduce a proper bill into Parliament, lawyers working in the previously discussed branches within the Department of Justice will be involved: the Legal Services Unit, the Legislative Services Branch and the Human Rights Law Section (see I. Introduction). The respective involvement of these bodies of expertise will provide guidance over the course of the policy development and legislative drafting processes. This guidance,

along with suggestions to government officials, trigger changes in policies and address any potential legal issues that may impact constitutional requirements, protected rights, or any other legal requirements. Similarly, draft legislation will be discussed and amended through the same process of back and forth between branches and with the client. The wording of the proposed legislation will be analyzed, discussed, tweaked and amended in order to minimize, if not neutralize any possible legal issues.

i. The Legal Services Unit

[231] The evidence, as presented, shows that the Legal Services Unit counsel's involvement typically begins at the very embryonic stages of the policy proposal made by a client. Early on, the Legal Services Unit counsel will contribute to identifying any *Charter* or other legal issues and provide legal advice as to how best to solve them.

ii. The Human Rights Law Section

[232] The Human Rights Law Section is the centre of expertise on human rights touched by the *Charter*, the *Bill of Rights*, the *Canadian Human Rights Act*, RSC 1985, c H-6, as well as Canada's international human rights obligations. Throughout both the policy development process and legislative drafting, Human Rights Law Section counsel will provide expert advice on any risk of inconsistency with guaranteed rights identified by the Legal Services Unit or Legal Services Branch lawyers.

iii. The Legal Services Branch

[233] Legal Services Branch counsel will be involved not only with pure legislative drafting but also with the legislative proposal development process. Legal Services Branch counsel will continually adapt the drafting of the bill to the evolving discussions and the legal advice provided. They will also keep a watchful eye for consistency with guaranteed rights in collaboration with counsel of the Human Rights Law Section and of the Legal Services Unit.

b) *Certification*

[234] Before the bill is forwarded to the Leader of the Government in the House of Commons, the legislative drafting is finalized and lawyers from the Legal Services Branch will examine the bill for any inconsistencies. As explored in an earlier section, the final examination of government bills, known as "certification", is performed by the Chief Legislative Counsel, in consultation with counsel from the Human Rights Law Section. From the beginning of the policy development process, the projected bill is routinely examined at its earliest stages in order to ensure that the bill does not contain inconsistencies. If an inconsistency is identified, it will be brought to the attention of the concerned parties and either corrected or determined to fit within the scheme of the "credible argument" standard.

c) *Memorandum to Cabinet*

[235] The result of the consultative process between branches and between the Department of Justice and the client is the production of a Memorandum to Cabinet. As briefly explained in

previous sections, the Memorandum to Cabinet is a document that is presented to Cabinet to obtain its approval in order to move the project forward. A Memorandum to Cabinet can contain, among other things, the policy being addressed, the arguments in favour and against, the legal issues created by the policy and how they are addressed, the legal issues the policy aims to solve, the monetary requirements to put the policy in practice, and a copy of the legislative proposal. The Prime Minister and his Ministers will discuss the Memorandum to Cabinet and determine whether amendments or further discussions are necessary. Following this process, the Memorandum is either approved or not. If approved, the project returns to the Department of Justice and to the client for more internal discussions and internal drafting finalization. Once those steps are completed, the bill is ready to be forwarded to the Leader of the Government in the House of Commons, who will ultimately verify that the draft bill meets Cabinet's expectation. If the draft bill is satisfactory, he or she will table the bill into Parliament.

d) *Leader of the Government in the House of Commons*

[236] The responsibility of the Leader of the Government in the House of Commons is to review the draft bill in order to ensure that it meets Cabinet's mandate. Subsequently, subject to Cabinet's approval or directives, the Leader of the Government will table the bill for first reading.

e) *The Minister of Justice's Examination and Reporting Duty*

[237] Once the bill is tabled in the House of Commons, the Minister of Justice's personal obligation to ascertain whether the bill is consistent with guaranteed rights is triggered. If indeed

the Minister finds an inconsistency, she must report the inconsistency to the House of Commons "at the first convenient opportunity".

f) *A Similar Process Is Followed for Regulations*

[238] For the sake of thoroughness, in the case of draft regulations, a comparable duty to that of the Minister of Justice to examine and report inconsistencies is imposed on the Clerk of the Privy Council. The Clerk of the Privy Council will ascertain whether or not the regulations contain an inconsistency. If the Clerk does indeed find an inconsistency, the Clerk, in consultation with the Deputy Minister of Justice, will report the inconsistency to the regulation-making authority.

Part (3) -- Conclusions on Process

a) *How Lawyers within the Department of Justice Assume the Examination Responsibility*

[239] In light of the plain meaning to be given to section 4 of the *Department of Justice Act*, it is now appropriate to look at how the lawyers within the Department of Justice assume this delegated responsibility on behalf of the Minister. To understand and decide on this question, I have read the affidavits and cross-examinations of: Principal Analyst with the Parliamentary Information and Research Service of the Library of Parliament of Canada John Stilborn; former employee in the Human Rights Law Section of the Department of Justice of Canada Martin Low; Former Chief Legislative Counsel and Assistant Deputy Minister of the Department of Justice's Legislative Services Branch John Mark Keyes; and Deputy Minister of Justice William Pentney. I have also reviewed the five documents the parties have identified as sufficient to set out the

standard used. These documents contain important redactions in order to protect solicitor-client privilege, as detailed below by the amount of pages available to the Court compared to the total pages of the documents. The *Statement of Agreed Facts* filed by the parties contains the five following documents:

1. Statutory Examination Responsibilities and Legal Risk Management in Drafting Services, 9 March 2006; 16 out of 28 pages (Appendix 1).

2. Legal Risk Management in the Public Law Sector, 26 November 2007, 5 out of 12 pages (Appendix 2).

3. Effective Communication of Legal Risk, 15 December 2006, 6 out of 14 pages (Appendix 3).

4. In Our Opinion, April 2012, 14 out of 55 pages (Appendix 4).

5. Charter Certification Process, 3 out of 3 pages (Appendix 5).

[240] Based on the evidence presented to the Court, I confirm that the Department of Justice's policy approach in regards to inconsistencies with guaranteed rights is that an inconsistency only exists when there is no reasonable argument that can be made, in good faith, in favour of consistency. As we will see in the following paragraphs, this approach, in its final terminology, became known as the "credible argument" standard. To understand how the Department arrived at this credible argument standard, a bit of history is required.

b) *History of the Credible Argument Standard*

[241] First, in light of the *Charter* coming into force, the Human Rights Law Section was established in 1982. The Human Rights Law Section was meant to be a centre of expertise dealing with all human rights issues. It was also tasked to advise the Minister of Justice on how to perform her examination obligations.

[242] After debating which standard the examination provisions mandated, the Human Rights Law Section concluded that the "no reasonable argument" standard, the precursor of the current "credible argument" standard, properly reflected the obligations. The Human Rights Law Section came to this conclusion after having reviewed the following factors: (1) the text of the examination provisions; (2) the consultative process inherent in legislative drafting; (3) the implications of the Minister reporting an inconsistency with guaranteed rights; and (4) the need for a qualitative approach that accounted for an examination that could not be conducted with precision or certainty.

[243] This "no reasonable argument" standard was followed between 1982 and 1991 and the impact of the above factors was continuously reviewed. Notably, the last factor enumerated, which required a qualitative approach, accounted for the uncertainty created by the reality that *Charter* jurisprudence did not exist yet. Over the years, *Charter* judgments slowly trickled in and required continuous adaptation to the principles established.

[244] Second, in 1993, the Department of Justice reviewed the standard applied and the processes by which it operated. This consultation involved all Senior Committees of the Department of Justice. This review looked at different options for the standard. Alternatives such as the "more likely than not inconsistent with guaranteed rights" standard were considered. But, at the end of this process, it was determined that the most appropriate standard to apply remained the "no reasonable argument standard". At the outset of the review process, the "no reasonable argument" standard was renamed the "credible argument" standard. Substantively, the two standards remain the same.

[245] Since the creation of the Human Rights Law Section in the 1980s, the threshold to trigger a report was reached only when no credible argument could be advanced in support of the consistency with guaranteed rights of the proposed legislation. Conversely, for the examination obligations to be respected, there must have existed an argument that was reasonable, *bona fide*, and capable of being raised before and accepted by the Courts. This standard is still used today.

[246] In other words, for the standard to be met, meaning the obligation to report is not triggered, there must exist an argument in favour of not breaching guaranteed rights. This argument in favour of guaranteed rights requires substantial, but not absolute, certainty that an inconsistency does not exist. If a credible argument can be advanced, the examination obligations will be met and thus no report will be made. Accordingly, if a credible argument that meets the above criteria is brought forward, there cannot be certainty that the legislation is inconsistent with the *Charter* and the *Bill of Rights*.

[247] Third, this approach was reviewed in 2003 and updated again in 2005, 2006, and 2008. As of today, it is still the standard applied for the examination process and the reporting obligation.

c) *The Effect of Applying This Standard*

[248] In essence, the standard, as applied, assesses provisions of a draft bill and identifies any potential inconsistency with guaranteed rights. Furthermore, any argument of a serious nature based on jurisprudence that would render the provision consistent is considered, as is any argument that would justify an inconsistency pursuant to section 1 of the *Charter*. Thus, we can say that a credible argument is an argument of a quality such that the Courts could potentially justify the inconsistency pursuant to section 1 of the *Charter*.

d) *Statistics on the Supreme Court of Canada Jurisprudence*

[249] The Defendant has filed statistics looking back at jurisprudence of the Supreme Court of Canada from 2006 until 2015 regarding the application of the credible argument standard.

[250] The Defendant contends that the statistics show the credible argument standard functions properly because the results of the study demonstrate that in the majority of cases, a credible argument in favour of consistency was seriously considered by the Court, whether that be in a dissent or in the majority's analysis. The study also shows that sometimes, even though the Supreme Court may have been unanimous when ruling on consistency with guaranteed rights against the Defendant, lower Courts either retained or seriously considered the Defendant's

credible argument. The Defendant submits that the credible argument standard is thus properly actualized in practice because the courts validate the fact that the Department of Justice was correct when determining that the proposed legislation was not obviously inconsistent when the legislation was examined prior to its enactment.

[251] Here are some conclusions I can glean from the statistics submitted: out of 34 cases involving a *Charter* challenge to federal legislation, 65% (22 cases) passed the *Charter* compliance test, while 35% (12 cases) did not. Among the 12 cases that did not pass *Charter* compliance at the Supreme Court, 4 of them contained dissident *Charter* opinions. Again, out of the 12 cases, 25% (4 cases) had either a favourable lower court decision or dissent at appeal. The tabulation of these 34 cases appears as "Annex 2".

[252] These results show that over the last fifteen years, the credible argument standard has been meaningfully applied in jurisprudence. In the majority of cases where federal legislation was challenged on *Charter* grounds there were credible arguments in support of the legislation regardless of how those arguments were ultimately treated by the Supreme Court. What matters is that the arguments were taken seriously by the courts and not simply dismissed as frivolous; in other words, they were credible.

Part (4) -- Conclusions on the Role of the Executive

[253] Before moving on to the role of Parliament, it can be said that the interpretation given to the plain meaning of the sections at play is reflected in the "credible argument" standard. A Minister of Justice who is asked to ascertain whether a provision of draft legislation is

inconsistent with guaranteed rights cannot do so if she finds that a reasonable, *bona fide* argument could justify the inconsistency. As I have determined earlier, following a searching review, to "ascertain" calls for certainty to be reached in regards to the existence of an inconsistency. The fact that an argument of a substantial nature can be made prevents certainty from ever being reached.

[254] To rely on percentages of success is neither a reliable indicator of the quality of analysis performed nor is it reflective of the nature of the type of assessment required by the examination provisions; it is not akin to gambling probabilities. Rather, to "ascertain" requires a substantial assessment that can only properly be executed if, in light of the facts at issue, an argument is realistic, sound, serious, and made in good faith.

[255] As we all know, the legal and judicial worlds evolve. Jurisprudence from previous decades may need to be adapted to new situations of fact and to evolving legal principles. Jurisprudence must also evolve in light of changing societal values and contexts, as reflected by the content of section 1 of the *Charter*. Therefore, legal arguments of years passed, which did not get proper recognition the first time around, could very well be accepted in future cases. Judicial dissents in one case can become the majority opinion in analogous cases years later. In such a situation, the "credible argument" standard finds its full meaning, impact and recognition.

[256] In addition, the examination process, from its inception until its final stages, has its own benefits and usefulness. Notably, as both the policy discussions within the Department of Justice and those with the client evolve, potential inconsistencies with guaranteed rights can be

identified, addressed and potentially neutralized. This process can be understood from the outside looking in, even if the observer does not benefit from an internal vantage point into the affairs protected by various privileges. From the outside observer's perspective, the evidence presented does indeed show that this process occurs and, in practice, achieves its objectives.

[257] Furthermore, at the stage of Cabinet involvement, which involves the Minister of Justice and his colleagues, the system again provides for discussions among Ministers in regards to any inconsistency that may exist if a policy is enacted. Surely, it is not an objective of Cabinet to promote legislation that may be found inconsistent with guaranteed rights. Therefore, it can be expected that Cabinet will try to prevent such an inconsistency from materializing, all the while considering its policy objectives and the extent upon which it intends to rely on section 1 of the *Charter* if the legislation is challenged. It may also consider the political decision rely on the notwithstanding clause (section 33). As of today, no federal executive has resorted to the notwithstanding clause. A resignation of the Minister of Justice under cloudy reasons is not what a Prime Minister wants. Yet, even if the Minister of Justice resigns, there is no guarantee that public debate will follow.

[258] In any case, regardless of whether we know what transpires at the Cabinet table or not, we can presume that discussions pertaining to guaranteed rights and inconsistencies will occur between the Minister of Justice and the other Ministers. Ministers will do their utmost to prevent inconsistencies and to prevent unnecessary conflicts with the Minister of Justice. This shows another layer of preventive control in regards to inconsistencies.

[259] Finally, at the last step of Executive involvement, once Cabinet has approved the Memorandum to Cabinet, the legislative drafting functions of the Department of Justice will be in motion in order to finalize the bill. Once again, within the Department of Justice, an in-house legislative review involving the drafters is performed. If necessary, the expertise of the Human Rights Law Section and of the Legal Services Unit may also be tapped. If any inconsistency remains at this stage, it can once again be dealt with, if not neutralized. The process consists of many cycles of revision and many stages of back and forth between all the parties involved.

[260] At the end of the process, if an inconsistency unjustified by a credible argument remains, the Minister of Justice (for bills) and the Clerk of the Privy Council in collaboration with the Deputy Minister of Justice (for regulations) will need to seriously consider their reporting obligations to the House of Commons or to the regulation-making authority. But, as seen earlier, the reporting obligation has never been triggered in regards to a government bill and the probabilities of such a scenario occurring are very low due to the extent of the examination process and to the application of the "credible argument" standard.

[261] Governments, for political reasons, do not want to be seen as actively promoting breaches to guaranteed rights. It is possible that in order to avoid being forced into using the section 33 notwithstanding clause of the *Charter*, which indubitably carries political consequences, governments will naturally try to promote bills that are not breaching guaranteed rights. Indeed, both section 1 and section 33 of the *Charter* function within the wider constitutional context of the examination provisions: they are formal legal tools but also incidentally promote the enactment of quality legislation.

[262] As a side comment, it is important to note that under present political trends, a ministerial report to the House of Commons is unlikely and perhaps unrealistic. Why would a government declare openly, through a report from the Minister of Justice addressed to the House of Commons, that the bill it is introducing violates the *Charter* or the *Bill of Rights*? Why would the government expose itself to criticism of the opposition and the public in such a way? Such a disclosure would also likely provide ample ammunition to anybody challenging the future law in court. The result of the following debates would most likely force the government to disclose how it intends to defend itself from such a challenge pre-emptively. A government, faced with such a difficult situation, might as well resort to the notwithstanding clause of the *Charter*. The theory supporting the reporting obligation is sound, but the political reality of its actualization is complex and must be understood in a realistic context. It can be expected that a government will do everything that is realistically possible to avoid such a situation where a report is necessary. The government will aim to correct and to minimize any blatant inconsistency before the obligation to report is triggered. The examination process, as it is set up, is such that prior to the reporting obligation step, any problematic issue relating to guaranteed rights will have been addressed. Relying on the evidence, notably the affidavit and testimony of Deputy Minister of Justice William Pentney, I find that the overall process aims to address the potential breaches to guaranteed rights in a way such that potential breaches to guaranteed rights have been acted upon by the end of the process. At the outset of the process of checks and balances, all that may remain is a good, sound argument to show that sensitive provisions at play are legal and will be interpreted within the parameters of section 1 of the *Charter*.

[263] Afterwards, if all goes smoothly, the bill will be sent to the Leader of the Government in the House of Commons for approval and to be tabled.

[264] All in all, the detailed and multi-pronged process surrounding the responsibilities of the Executive in regards to the actualization of the examination provisions clearly shows that the colouring to be given to the applicable standard is heavily influenced by the political and legal contexts in which the "credible argument" standard has been forged. As described above, the structure of the Executive, the process by which a policy is development into legislation, the history and evolution of the examination standard within the Department of Justice, and the realities of politics all weigh heavily towards an interpretation of the examination provisions that favours the "credible argument" standard over the "more likely than not inconsistent" standard.

[265] However, I am not done exploring the colouring brought to the examination provisions: I have explored the Executive's contribution to the "credible argument" standard, but the influence on the wider context of the remaining branch of government remains to be fleshed-out. In the next section, I will focus on the role of Parliament.

D. Section 3 – Parliament's Role

[266] The Legislative Branch, also known as Parliament, is where elected persons, known as Members of Parliament, gather in the House of Commons, and participate with appointed senators in the Senate, to discuss bills and potentially approve them by vote. Bills initiated by the Executive are known as government bills, and bills originating from a private member of the House or of the Senate are known respectively either as a Private Member's Bill or as a Senate

Public Bill. Private Members' Bills or Senate Public Bills may only be introduced by a person who is not a member of Cabinet.

[267] Parliament is the final institution that studies bills from the government before they are enacted into laws. Once under the responsibility of Parliament, bills undergo a detailed process of review in both chambers, the House of Commons and the Senate, until a final version of the bill is approved by democratic vote and is put before the Governor General, the Head of State (representing the Queen), to be signed into law. As such, Parliament plays a crucial examination role in identifying inconsistencies with guaranteed rights.

[268] In the next few paragraphs, I will further colour the context of the examination provisions by exploring the various stages of review a bill undergoes in Parliament; by examining the impact of a former Minister of Justice's bill that aimed to change the examination provisions by legislative means; and by ascertaining Parliament's responsibilities when it examines draft legislation.

Part (1) -- Parliamentary Process

[269] It is Parliament's duty to keep the Executive accountable for its legislative work. After a bill is tabled by the Executive, before it becomes law, it must survive the scrutiny of Parliament. There are three main steps to the scrutiny of Parliament, known as readings. In order for a bill to reach the next reading, the chamber must vote in the bill's favour. Only when a bill is voted in its final form, at third reading, by both the House of Commons and the Senate, can it be presented to the Governor General to be signed into law.

[270] The first reading happens after the bill is tabled in the House of Commons by the Leader of the Government in the House of Commons. At first reading, a bill will be introduced to the chamber and debated. At the second reading, a Committee of the House scrutinizes the provisions of the bill clause by clause. The Committee may also hear the Minister responsible for the bill or the Minister of Justice. It may also invite witnesses such as lawyers, experts, professors and any party it deems pertinent to comment on the bill. The Committee may also rely on outside expert advice, on clerks, on parliamentary counsel, and on the research capabilities of the Library of Parliament. The equivalent process and research capacities also exist in the Senate. Throughout this examination process by Parliament, amendments may be debated and submitted for approval.

[271] Before a bill passes the third and final reading, Parliament will have had many opportunities to identify and fix any inconsistencies. Obviously, the examination process in Parliament is subject to the whims of politics, whether through party policy or government directives to its own members. Parliament strives to enact laws that will not be found in breach of guaranteed rights. But it is important to note that Parliament, like the Executive, also does not impose on itself the obligation to pass legislation that is guaranteed to be fully *Charter* compliant.

Part (2) -- Member of Parliament Irwin Cotler's Bill C-537

[272] In 2013, during the 41st Parliament, a Member of Parliament, the Honourable Irwin Cotler, a former Minister of Justice, introduced in the House of Commons his Private Member's Bill C-537. This bill aimed to legislatively lower the reporting threshold of the Minister of

Justice after examining government bills for inconsistencies with guaranteed rights. It proposed to amend the examination provisions in order that:

1. Every bill would be examined by the Law Clerk and Parliamentary Counsel of the House in which it is introduced with the assistance of the Library of Parliament;

2. The purpose of the examination would be "to determine whether any of the provisions of the Bill is likely to be inconsistent" with guaranteed rights or the Constitution;

3. A provision of a bill would likely be inconsistent with guaranteed rights where the responsible Law Clerk and Parliamentary counsel would form the opinion "that, if that provision were to be challenged in Court, it would, on the balance of probabilities, be found to infringe, limit or violate those rights". (Canada, Bill C-537, *Constitution Compliance Review Act*, 2nd Sess, 41st Parl, 2013, cl 3, 5).

[273] Interestingly, this bill died at first reading and was not discussed further. The significance of this new standard proposed by Mr. Cotler is that it is much more in line with the "more likely than not inconsistent" standard promoted by the Plaintiff. This new standard would also bolster the role of the Law Clerk and of Parliamentary counsel by mandating them to give legal opinions to Parliament on the probabilities of a bill to impact negatively on guaranteed rights.

Part (3) -- Parliament's Role in Examining Draft Legislation

[274] Parliament has an important role to play in examining draft legislation for inconsistencies with guaranteed rights. It also has a duty to determine whether the proposed legislation fits within parameters dictated by the Constitution.

[275] And herein lies a key aspect of this case: to each its own responsibilities. Parliament is expected to assume its obligations to examine bills and debate issues that may affect guaranteed rights. Parliament must not place its duties on the shoulders of the other branches, notably on those of the Minister of Justice.

[276] The Minister of Justice is not Atlas, carrying the world of guaranteed rights on her shoulders. As described above, the Minister of Justice has statutory obligations to examine draft legislation and to report to Parliament if she ascertains that an inconsistency with guaranteed rights exists at the end of the Executive's role in shaping draft legislation. The Minister of Justice assumes these responsibilities as a member of the Executive and as the legal advisor to Cabinet. It is true that the Minister of Justice reports an inconsistency to Parliament, but this duty does not make her a legal advisor to the House of Commons; others assume this role. Her loyalties remain to the Executive. Parliament has many other means by which it can acquire more than sufficient legal advice; it simply must make the effort to do so.

Part (4) -- Conclusions on Colouring in Regards to Parliament's Role

[277] To each his own obligation: the Executive governs and introduces bills to Parliament; Parliament examines and debates government bills and, if they are acceptable to Parliament, enacts them into law; the Judiciary, following litigation or a reference, determines whether or not legislation is compliant with guaranteed rights. Each branch of our democratic system is responsible for its respective role and should not count on the others to assume its responsibilities.

[278] As Deputy Minister of Justice Pentney said in his affidavit at paragraph 84 and during his testimony before the Court:

> "The examination standard must therefore reflect the role of Parliament in our constitution. Elected governments shape policy and introduce legislation as they think best, while remaining mindful of the outer boundaries set by the *Constitution* and by guaranteed rights. Parliament debates and enacts legislation, including giving consideration to its consistency with the *Constitution* and the *Bill of Rights*; Courts have the ultimate responsibility to decide whether legislation is constitutional. The credible argument standard is intended to allow each Branch of Government to perform its appropriate role in ensuring that guaranteed rights are respected".

This system is referred to as "checks and balances". The actions of each branch, when they assume their respective roles, create multiple checks and balances, all of which aim to ensure that our laws are compliant with the rights guaranteed by the *Charter* and the *Bill of Rights*. As Professor emeritus Peter W. Hogg was referred to saying previously, the main safeguards of civil liberties in Canada are the democratic character of Canadian political institutions, the

independence of the judiciary, and a legal tradition of respect for civil liberties. Each component has a vital role to play in ensuring our laws are properly enacted and respect our rights.

[279] Section 3 of the *Bill of Rights* and section 4 of the *Department of Justice Act* must be viewed through this contextual colouring. The context within which the examination process and the reporting obligation exist is reflected through the words enouncing these duties. Words such as "ascertain", "whether", "there is an inconsistency" with our "guaranteed rights" point to respect for the separation of powers and the responsibilities imposed on each branch that separation entails. Not only does the plain meaning interpretation give full credence to the "credible argument" standard, the constitutional and institutional contexts also fully support it. Guaranteed consistency with rights is not the sole purview of the Executive and of the Minister of Justice, it is an ideal to be strived for collectively and attained through the concerted efforts of the three branches of government working towards a common goal. Such is the way to ensure our laws are compliant with our guaranteed rights.

IX. CONCLUSION

A. Outcome and Closing Remarks

[280] By relying on the ordinary meaning of the provisions under study, on the overall legislative intent which supports the plain meaning approach, and the constitutional and institutional contexts, Prof. Sullivan's proposed questions (see above at paragraph 101) in regards to interpretation can be answered the following way:

Part (1) -- What is the meaning of the legislative text?

[281] In regards to the plain meaning, the differences between the statutes creating the duties to examine and report are important: the three relevant statutes use slightly different words to refer to the same obligations, leading to confusion but also to answers upon closer inspection. Another crucial piece of the puzzle is the French versions of these statutes: there are important, subtle differences of meaning between the French and English provisions, whether those differences arise in the provisions taken wholly or in subtle variations of specific words. Ascertaining the shared meaning of the examination provisions requires me to carefully consider the minute nuances of the provisions in both official languages. As concluded above, the plain meaning analysis yields the following results: the statutes which are almost identical to each other, and the various words used in both French and English establish that the plain meaning requires the Minister of Justice to "ascertain" whether an inconsistency is present or not. The words "vérifier", "rechercher", "examiner" and "do not trespass unduly" all support "ascertain" as the correct plain meaning of the examination provisions. On the contrary, the use of the word "ensure" is always tempered by the much weaker French equivalents used.

Part (2) -- What did the legislator intend? That is, when the text was enacted, what law did the legislator intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?

[282] As the above analysis shows, the legislator intended for the examination provisions to require the Minister of Justice to "ascertain" whether or not an inconsistency with guaranteed rights existed. The evidence shows that the words "ensure" and "ascertain" were both thoroughly considered. In the end, "ascertain" was retained as it properly reflected the amount of

responsibility and control the Minister of Justice ought to be entrusted with given the impact of the examination and reporting duties on separation of powers and government business. The legislator aimed to promote consistency with guaranteed rights but did not impose on the Minister of Justice the onerous and most likely impossible responsibility of guaranteeing inconsistency-free legislation.

Part (3) -- What are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislator is presumed to respect?

[283] It is important to remember that the legal question at hand is to determine if the Minister correctly interprets what is the required standard from the statutes creating it. The Court's task today is not to determine if the Minister of Justice properly assumes these obligations in practice.

[284] Following our analysis of the plain meaning, of the legislator's intent, and of the constitutional and institutional contexts, I conclude that the only possible interpretation to be given to the examination provisions is that the "credible argument" standard is correct. The outcome the Plaintiff seeks cannot be granted by this Court. I simply cannot read into legislation concepts that the words do not reflect. The "more likely than not inconsistent" standard, no matter how laudable, is simply not reflected in the examination provisions placed in context.

[285] The examination provisions, once interpreted, do not call for a different, stricter mechanism based on the "more likely than not inconsistent" standard. The present system requires the "credible argument" standard to correctly reflect the wording of the examination provisions. It is not a system that aims to give a full guarantee that draft bills and draft

regulations are *Charter*-proof. Yes, there is no doubt the reporting mechanism is weak, but I cannot read into it more than the legislation provides for. The examination mechanism, on the other hand, shows that draft bills and draft regulations are, hypothetically, reliably checked within the Department of Justice in order to identify and neutralize potential inconsistencies. Yet, the Minister of Justice is not bound by the opinion reached by the lawyers of the Legal Services Branch who performed their analysis regarding consistency with guaranteed rights. It is not the drafter's role to fetter the discretion of the Minister when she personally ascertains whether an inconsistency is present or not.

[286] If the objective of the examination provisions was to guarantee that laws do not breach guaranteed rights, then the legislation needs to be reworded. In the meantime, the present legislation remains. The present examination provisions could notably be improved by making the language between the statutes and between the French and English versions consistent.

[287] Legislative change is needed if we deem it necessary to reform the current system. Different countries use different language, different balances of parliamentary supremacy, and different legal mechanisms to effect different examination and reporting standards. If there is political will to alter the balance Canada has opted to strike, it is for the proper political and legislative processes to achieve. If indeed, the applicable standard warrants change, the appropriate channel by which to do so is the legislative process. Mr. Irwin Cotler's Bill C-537 attempted such a modification. Although his proposed modifications did not become law, his method illustrates the appropriate conduit to enact reforms. The means to do so may be different

than those identified by Mr. Cotler, but if changes to the examination and reporting processes are called for, new legislation will need to be enacted and existing statutes amended.

[288] If, following the entire process explored above designed to identify and mitigate inconsistencies, a member of the public opines that a law should be challenged, both private and public resources exist to facilitate litigation pursued in the public interest. We must be cognizant that government support for public interest litigation is a matter of policy. For example, the now defunct "Court Challenges Program", was created in the late 1970s by the government and aimed to help fund constitutional challenges mounted by the public. The "Court Challenges Program" has been abolished as of 2006 but it remains a policy choice of the government of the day to re-establish such a program. From the tabulation of cases that made their way to the Supreme Court of Canada from 2006 to 2015 (see "Annex 2"), I take notice that whether this program exists or not, constitutional challenges to federal legislation in front of the Courts continue.

[289] In Canada, each institution has its own roles and responsibilities. We must not conflate the duties of each actor with those of the others. Notably, Parliament should assume its respective responsibility to review and debate legislation emanating from the Executive with its own chosen means. If Parliament requires further resources to fulfil its duties, it should call for them. The reporting duty of the Minister of Justice, as it stands, cannot and should not replace the scrutiny of Parliament; the "credible argument" standard reflects this.

B. Costs

[290] The Defendant is not claiming costs against the Plaintiff and the Plaintiff has been granted advance costs as per the order of this Court dated March 11, 2013. As counsel so advised the Court at the last hearing, it seems there are still unsettled issues in regards to the advance costs. In order to finalize the advance costs order dated March 11, 2013, counsel for the Plaintiff has 30 days from the date of this judgment to file submissions. Counsel for the Defendant will then have 20 days to respond.

JUDGMENT

THIS COURT'S JUDGMENT IS that:

1. This simplified action is dismissed.

2. The Court declares that the "credible argument" examination standard used by the Department in its review of legislation under section 3 of the *Canadian Bill of Rights*, section 4.1 of the *Department of Justice Act*, and section 3 of the *Statutory Instruments Act* is appropriate and lawful.

3. The Court declares that the "more likely than not inconsistent" approach advocated by the Plaintiff does not reflect section 3 of *the Canadian Bill of Rights*, section 4.1 of the *Department of Justice Act*, and section 3 of the *Statutory Instruments Act*.

4. As to the issue of costs, counsel for the Plaintiff has 30 days from the date of judgment to file submissions. Counsel for the Defendant has 20 days to respond.

"Simon Noël"
Judge

ANNEX 1 – RELEVANT LEGISLATION

Canadian Bill of Rights, SC 1960, c 44

Duties of Minister of Justice

3.(1) Subject to subsection (2), the Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Exception

(2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of this Part.

Department of Justice Act, RSC 1985, c J-2

Examination of Bills and regulations

4.1(1) Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the

Déclaration canadienne des droits, SC 1960, c 44

Devoirs du ministre de la Justice

3.(1) Sous réserve du paragraphe (2), le ministre de la Justice doit, en conformité de règlements prescrits par le gouverneur en conseil, examiner tout règlement transmis au greffier du Conseil privé pour enregistrement, en application de la *Loi sur les textes réglementaires*, ainsi que tout projet ou proposition de loi soumis ou présentés à la Chambre des communes par un ministre fédéral en vue de rechercher si l'une quelconque de ses dispositions est incompatible avec les fins et dispositions de la présente Partie, et il doit signaler toute semblable incompatibilité à la Chambre des communes dès qu'il en a l'occasion.

Exception

(2) Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la *Loi sur les textes réglementaires* et destiné à vérifier sa compatibilité avec les fins et les dispositions de la présente partie.

Loi sur le ministère de la Justice, LRC 1985, c J-2

Examen de projets de loi et de règlements

4.1(1) Sous réserve du paragraphe (2), le ministre examine, conformément aux règlements pris par le gouverneur en conseil, les règlements transmis au greffier du Conseil privé pour enregistrement, en application de la *Loi sur les textes réglementaires* ainsi que les projets ou propositions de loi soumis ou présentés à la Chambre des communes par un ministre fédéral, en vue de vérifier si l'une de leurs dispositions est incompatible avec les fins

purposes and provisions of the Canadian Charter of Rights and Freedoms and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Exception

(2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms.

et dispositions de la Charte canadienne des droits et libertés, et fait rapport de toute incompatibilité à la Chambre des communes dans les meilleurs délais possible.

Exception

(2) Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la *Loi sur les textes réglementaires* et destiné à vérifier sa compatibilité avec les fins et les dispositions de la Charte canadienne des droits et libertés.

***Statutory Instruments Act*, RSC 1985, c S-22**

EXAMINATION OF PROPOSED REGULATIONS

Proposed regulations sent to Clerk of Privy Council

3.(1) Subject to any regulations made pursuant to paragraph 20(a), where a regulation-making authority proposes to make a regulation, it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.

Examination

(2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that

(a) it is authorized by the statute pursuant to which it is to be made;

(b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

***Loi sur les textes réglementaires*, LRC 1985, c S-22**

EXAMEN DES PROJETS DE RÈGLEMENT

Envoi au Conseil privé

3.(1) Sous réserve des règlements d'application de l'alinéa 20a), l'autorité réglementaire envoie chacun de ses projets de règlement en trois exemplaires, dans les deux langues officielles, au greffier du Conseil privé.

Examen

(2) À la réception du projet de règlement, le greffier du Conseil privé procède, en consultation avec le sous-ministre de la Justice, à l'examen des points suivants :

a) le règlement est pris dans le cadre du pouvoir conféré par sa loi habilitante;

b) il ne constitue pas un usage inhabituel ou inattendu du pouvoir ainsi conféré;

(c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights; and

c) il n'empiète pas indûment sur les droits et libertés existants et, en tout état de cause, n'est pas incompatible avec les fins et les dispositions de la Charte canadienne des droits et libertés et de la Déclaration canadienne des droits;

(d) the form and draftsmanship of the proposed regulation are in accordance with established standards.

d) sa présentation et sa rédaction sont conformes aux normes établies.

Advise regulation-making authority

Avis à l'autorité réglementaire

(3) When a proposed regulation has been examined as required by subsection (2), the Clerk of the Privy Council shall advise the regulation-making authority that the proposed regulation has been so examined and shall indicate any matter referred to in paragraph (2)(a), (b), (c) or (d) to which, in the opinion of the Deputy Minister of Justice, based on that examination, the attention of the regulation-making authority should be drawn.

(3) L'examen achevé, le greffier du Conseil privé en avise l'autorité réglementaire en lui signalant, parmi les points mentionnés au paragraphe (2), ceux sur lesquels, selon le sous-ministre de la Justice, elle devrait porter son attention.

ANNEX 2—LIST OF SUPREME COURT JURISPRUDENCE

This annex is reproduction of the graph submitted by the Defendant as Annex "B" of the Defendant's pre-trial memorandum. The footnotes have been inserted within the graph itself.

Review of SCC decisions dealing with *Charter* or *Canadian Bill of Rights* challenges from 2006 to 2015

(as of August 2015)

#	Citation	Issue	Outcome	Violation (Violation not saved under section 1 of *Charter*.)	SCC dissent (From majority decision of *Charter* violation.)	Inconsistent result or dissent in lower courts (Where the SCC decided there was a *Charter* violation.)
1.	*Guindon v Canada*, 2015 SCC 41	Whether s 163.2 of the *Income Tax Act* violates s 11 of the *Charter*.	Appeal dismissed. S 11 of the *Charter* is not engaged by s 163.2.	No	No	No
2.	*R v Smith*, 2015 SCC 34	Whether certain provisions of the medical marihuana access regime under the *Controlled Drugs and Substances Act* and the *Marihuana Medical Access Regulations* infringes s 7 of the Charter.	Appeal dismissed. Some of the challenged provisions under the *Act* violate s 7 of the *Charter*.	Yes	No	There was a dissent at the Court of Appeal (see 2014 BCCA 322)
3.	*R v Nur*, 2015 SCC 15	Whether the mandatory minimum terms of imprisonment in ss 95(2)(a)(i) and (ii) of the *Criminal Code* infringe ss 7 and/or 12 of the *Charter*.	Appeal dismissed. S 95(2)(a) violates s 12 of the *Charter*.	Yes	Dissent (3)	The Ontario Court of Appeal held that s 12 of the *Charter* was violated. (see 2013 ONCA 677) The Ontario Superior Court held that there was no violation of ss 12 or 15 of the *Charter*. It held there was a violation of s 7, but the applicant had no standing (see 2011 ONSC 4874)

#	Citation	Issue	Outcome	Violation (Violation not saved under section 1 of *Charter*.)	SCC dissent (From majority decision of *Charter* violation.)	Inconsistent result or dissent in lower courts (Where the SCC decided there was a *Charter* violation.)
4.	*Canada (Attorney General)* v Federation of Law Societies of Canada, 2015 SCC 7, [2015] 1 SCR 401	Whether certain provisions in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and Regulations, which relate to the information lawyers must keep and obtain about their clients, infringe ss 7 and/or 8 of the *Charter*.	Appeal allowed in part. Some of the challenged provisions violate ss 7 and 8 of the *Charter*.	Yes	No	No
5.	*Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331	Whether the *Criminal Code* provisions prohibiting physician-assisted death violate ss 7 and/or 15 of the *Charter*.	Appeal allowed. The challenged provisions violate s 7 of the *Charter*. The Court did not consider s 15 of the *Charter*.	Yes	No	The British Columbia Court of Appeal held that there was no *Charter* violation because the trial judge was bound by *Rodriguez v BC (AG)*, [1993] 3 SCR 519. There was a dissent. (see 2013 BCCA 435) The British Columbia Supreme Court held the prohibition violated s 7 of the *Charter*. (see 2012 BCSC 886)
6.	*Meredith v Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3	Whether certain provisions of the *Expenditure Restraint Act* infringe s 2(d) of the *Charter*.	Appeal dismissed. The challenged provisions do not violate the *Charter*.	No	No	No
7.	*Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3	Whether excluding RCMP members from collective bargaining and imposing a non-unionized labour relations regimes under the *Royal Canadian Mounted Police Regulations* infringes s 2(d) of the *Charter*.	Appeal allowed. The challenged provisions violate the *Charter*.	Yes	Dissent (1)	No

#	Citation	Issue	Outcome	Violation (Violation not saved under section 1 of *Charter*.)	SCC dissent (From majority decision of *Charter* violation.)	Inconsistent result or dissent in lower courts (Where the SCC decided there was a *Charter* violation.)
8.	*Wakeling v United States of America*, 2014 SCC 72, [2014] 3 SCR 549	Whether federal legislation (the *Criminal Code* and *Privacy Act*) authorizing the sharing of lawfully obtained wiretap information between Canada and foreign law enforcement agencies infringes ss 7 and/or 8 of the *Charter*.	Appeal dismissed. The challenged provisions do not violate the *Charter*.	No	No	No
9.	*Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176	Whether s 3(1) of the *State Immunity Act* is inconsistent with s 2(e) of the *Bill of Rights* and/or infringe s 7 of the *Charter*.	Appeal dismissed. S 2(e) of the *Bill of Rights* is not engaged in this case. There is no violation of s 7 of the *Charter*.	No	No	No
10.	*R v Conception*, 2014 SCC 60, [2014] 3 SCR 33	Whether certain provisions of the treatment order regime under the *Criminal Code* infringe s 7 of the *Charter*.	Appeal dismissed. The challenged provisions do not violate the *Charter*.	No	No	No
11	*Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37, [2014] 2 SCR 33	Whether the security certificate scheme under *the Immigration and Refugee Protection Act* infringes s 7 of the *Charter*.	Appeal allowed in part. The challenged provisions do not violate the Charter.	No	No	No
12.	*Canada (Attorney General) v Whaling*, 2014 SCC 20, [2014] 1 SCR 392	Whether s 10(1) of the *Abolition of Early Parole Act* that had the effect of delaying certain inmates' eligibility for day parole infringed s 11(h) of the *Charter*.	Appeal dismissed. S 10(1) of the *Act* infringes s 11(h) of the *Charter*.	Yes	No	No

#	Citation	Issue	Outcome	Violation (Violation not saved under section 1 of *Charter*.)	SCC dissent (From majority decision of *Charter* violation.)	Inconsistent result or dissent in lower courts (Where the SCC decided there was a *Charter* violation.)
13.	*Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101	Whether certain provisions of the *Criminal Code* that criminalized various activities related to prostitution infringe ss 7 and/or 2(b) of the *Charter*.	Appeal dismissed. The challenged provisions violate the *Charter*.	Yes	No	No
14.	*Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 SCR 157	Whether certain provisions of the *International Transfer of Offenders Act* that do not give a Canadian citizen who is sentenced abroad an automatic right to serve a sentence in Canada infringe s 6(1) of the *Charter*.	Appeal dismissed. The challenged provisions do not violate the *Charter*.	No	No	No
15.	*R v Levkovic*, 2013 SCC 25, [2013] 2 SCR 204	Whether s 243 of the *Criminal Code* infringes s 7 of the *Charter*.	Appeal dismissed. S 243 of the *Code* does not infringe s 7 of the *Charter*.	No	No	No
16.	*R v St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 SCR 187	Whether the statutory presumptions in certain provisions of the *Criminal Code* infringe ss 7, 11(c) and/or 11(d) of the Charter.	Appeal allowed in part. The challenged provisions infringe s 11(d) of the *Charter*. This infringement is only justified after certain words in the provisions are severed.	Yes	Dissenting in part (2)	No
17.	*R v Khawaja*, 2012 SCC 69, [2012] 3 SCR 555	Whether certain provisions in the Terrorism section of the Criminal Code infringe ss 2 and/or 7 of the *Charter*.	Appeal dismissed. The challenged provisions do not violate the *Charter*.	No	No	No

#	Citation	Issue	Outcome	Violation (Violation not saved under section 1 of *Charter*.)	SCC dissent (From majority decision of *Charter* violation.)	Inconsistent result or dissent in lower courts (Where the SCC decided there was a *Charter* violation.)
18.	*Sriskandarajah v United States of America*, 2012 SCC 70, [2012] 3 SCR 609	Companion appeal *to R v Khawaja*, 2012 SCC 69.	Appeal dismissed. The challenged provisions do not violate the *Charter*.	No	No	No
19.	*R v Tse*, 2012 SCC 16, [2012] 1 SCR 531	Whether s 184.4 of the *Criminal Code*, the emergency wiretap provision, infringes s 8 of the *Charter*.	Appeal dismissed. S 184.4 of the *Code* violates s 8 of the *Charter*.	Yes	No	No
20.	*Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 396	Whether ss 4(1) & 5(1) of the *Controlled Drugs and Substances Act*, which prohibit possession and trafficking, infringe s 7 of the *Charter*.	Appeal dismissed. The challenged provisions do not violate the *Charter*.	No	No	No
21.	*Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396	Whether certain provisions in the *Public Service Superannuation* and *Canadian Forces Superannuation Acts* related to supplementary death benefits infringe s 15(1) of the *Charter*.	Appeal dismissed. The challenged provisions do not violate the *Charter*.	No	No	No
22.	*R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110	Whether the s 38 scheme in the *Canada Evidence Act* infringes s 7 of the *Charter*.	Appeal allowed. The challenged provisions do not violate the *Charter*.	No	No	No
23.	*Toronto Star Newspapers Ltd. v Canada*, 2010 SCC 21, [2010] 1 SCR 721	Whether s 517 of the *Criminal Code*, which requires a judge to order a publication ban in certain circumstances, infringes s 2(b) of the *Charter*.	Appeal dismissed. S 517 of the *Code* infringes s 2(b) of the *Charter*, but the limit is justified under s 1.	No	No	No

#	Citation	Issue	Outcome	Violation (Violation not saved under section 1 of *Charter*.)	SCC dissent (From majority decision of *Charter* violation.)	Inconsistent result or dissent in lower courts (Where the SCC decided there was a *Charter* violation.)
24.	*R v J.Z.S.*, 2010 SCC 1, [2010] 1 SCR 3	Whether s 486.2 of the Criminal Code and s 16.1 of the *Canada Evidence Act*, which relate to the manner in which children testify, infringe ss 7 and 11 (d) of the *Charter*.	Appeal dismissed. The challenged provisions do not violate the *Charter*.	No	No	No
25.	*Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222	Whether certain money management provisions in the *Indian Act* infringe s 15(1) of the *Charter*.	Appeals dismissed. The challenged provisions do not violate the *Charter*.	No	No	No
26.	*R v D.B.*, 2008 SCC 6, [2008] 2 SCR 3	Whether certain reverse onus provisions in the *Youth Criminal Justice Act* infringe s 7 of the *Charter*.	Appeal dismissed. The challenged provisions violate the *Charter*.	Yes	Dissenting in part (4)	No
27.	*R v Ferguson*, 2008 SCC6, [2008] 1 SCR 96	Whether the mandatory minimum sentence of imprisonment imposed by s 236(a) of the *Criminal Code* infringes s 12 of the *Charter*.	Appeal dismissed. The challenged provision does not violate the *Charter*.	No	No	No
28.	*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350	Whether the certificate of inadmissibility scheme under *the Immigration and Refugee Protection Act* infringes ss7, 9, 10, 12 and 15 of the *Charter*.	Appeal allowed. The challenged provisions violate s 7, 9, and 10 of the *Charter*.	Yes	No	The trial judge and the Court of Appeal held that the challenged provisions did not violate the *Charter*. (see 2004 FCA 421, 2003 FC 1419)
29.	*Canada (Attorney General) v JTI-MacDonald Corp.*, 2007 SCC 30, [2007] 1 SCR 429	Whether certain advertising and promotion provisions of the *Tobacco Act* and the *Tobacco Products Information Regulations* infringe s 2(b) of the *Charter*.	Appeal allowed. The challenged provisions infringed s 2(b) of the *Charter*, but this infringement is justified under s 1.	No	No	No

#	Citation	Issue	Outcome	Violation (Violation not saved under section 1 of *Charter*.)	SCC dissent (From majority decision of *Charter* violation.)	Inconsistent result or dissent in lower courts (Where the SCC decided there was a *Charter* violation.)
30.	*Canada (Attorney General) v Hislop*, 2007 SCC 10, [2007] 1 SCR 429	Whether provisions of the *Canada Pension Plan* limiting eligibility for survivor benefits to same-sex partners of certain deceased contributors infringe s 15(1) of the *Charter*.	Appeal dismissed. Some of the challenged provisions violate the *Charter*.	Yes	No	No
31.	*R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527	Whether s 329 of the *Canada Elections Act*, which prohibits the transmission of election results in one district to another before all polling stations are closed, infringes s 2(b) of the *Charter*.	Appeal dismissed. S 329 of the *Act* infringes s 2(b) of the *Charter*, but this infringement is justified under s 1.	No	No	No
32.	*United States of America v Ferras; United States of America v Latty*, 2006 SCC 33, [2006] 2 SCR 77	Whether the treaty method under s 32(1)(b) of the *Extradition Act* infringes s 7 of the *Charter*.	Appeals allowed. S 32(1)(b) of the *Act* does not violate the *Charter*.	No	No	No
33.	*United Mexican States v Ortega; United States of America v Fiessel*, 2006 SCC 34, [2006] 2 SCR 120	Companion appeal to *United States of America v Ferras*; *United States of America v Latty*, 2006 SCC 33.	Appeals allowed. S 32(1)(b) of the *Act* does not violate the *Charter*.	No	No	No
34.	*R v Rodgers*, 2006 SCC 15, [2006] 1 SCR 554	Whether s 487.055(1) of the *Criminal Code*, which relates to taking DNA samples, infringes s 7, 8 and/or 11 of the *Charter*.	Appeal allowed. S 487.055(1) of the *Code* does not violate the *Charter*.	No	No	No
			Total:	12/34	4/12	4/12

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2225-15
STYLE OF CAUSE:	EDGAR SCHMIDT v THE ATTORNEY GENERAL OF CANADA AND CANADIAN CIVIL LIBERTIES ASSOCIATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 21, 22, 23 AND 24, 2015
JUDGMENT AND REASONS:	SIMON J.
DATED:	MARCH 2, 2016

APPEARANCES:

David Yazbeck	FOR THE PLAINTIFF
Alain Préfontaine Elizabeth Kikuchi Sarah Sherhols	FOR THE DEFENDANT
Cara Zwibel	FOR THE INTEVENOR

SOLICITORS OF RECORD:

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Canadian Civil Liberties Association Toronto, Ontario	FOR THE INTEVENOR

Department of Justice Canada | Ministère de la Justice Canada

FOR INFORMATION
NUMERO DU DOSSIER/FILE #: 2016-005239
COTE DE SECURITE/SECURITY CLASSIFICATION: Protected B

TITRE/TITLE: Meeting with the *External Panel on Options for a Legislative Response to Carter v. Canada*

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- The purpose of this note is to provide you with briefing materials in preparation for your meeting with the *External Panel on Options for a Legislative Response to Carter v. Canada* composed of Dr. Harvey Max Chochinov, Professor Catherine Frazee, and Professor Benoît Pelletier.
- The Panel held meetings with 73 individual experts in Canada, the U.S., the Netherlands, Belgium, and Switzerland and consulted with 92 representatives of interveners, medical authorities, and stakeholders from 46 Canadian organizations. It also received 321 written submissions, 14,949 responses to its online questionnaire, and submitted its final report to you and the Minister of Health on December 15, 2015.
- The Panel's online questionnaire revealed general support for physician-assisted dying (PAD) for patients with significant, life-threatening and/or progressive conditions, but only minority support for cases involving mental illness or disabilities.
- In submissions to the Special Joint Committee on PAD, the Panel's key messages included: enabling access to PAD, robust safeguards for vulnerable persons, implementing an oversight mechanism, and improving palliative care.
- In her personal submission to the Committee, Professor Frazee emphasized the potential negative impact of a PAD regime on those with disabilities and illnesses. Professor Frazee and Dr. Chochinov both helped develop the "Vulnerable Persons Standard," which proposes eligibility criteria for PAD similar to Quebec's law.
- [redacted]

s.19(1)

Soumis par (secteur)/Submitted by (Sector): Policy Sector

Responsable dans l'équipe du SM/Lead in the DM Team: Alexia Taschereau / Claudine Patry

Revue dans l'ULM par/Edited in the MLU by: Matt Ignatowicz

Soumis au CM/Submitted to MO: March 10, 2016

Department of Justice Canada
Ministère de la Justice Canada

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FOR INFORMATION

2016-005239

MEMORANDUM FOR THE MINISTER

Meeting with the *External Panel on Options for a Legislative Response to Carter v. Canada*

ISSUE

This note provides you with briefing materials in preparation for your meeting with the *External Panel on Options for a Legislative Response to Carter v. Canada* on March 15, 2016.

BACKGROUND

- On July 17, 2015, the former government announced the establishment of the *External Panel on options for a legislative response to Carter v. Canada* composed of Dr. Harvey Max Chochinov (chair), Professor Catherine Frazee, and Professor Benoît Pelletier (see the members' biographies in Annex 1). The Panel was mandated to consult with Canadians and stakeholders on issues that are fundamental to a federal legislative response to the Supreme Court of Canada ruling in *Carter* and to submit its final report to the ministers of Justice and of Health by November 15, 2015 (see the Panel's Terms of Reference in Annex 2).

On November 14, 2015, you and the Minister of Health modified the terms of the Panel's mandate so that its report would focus on the results of its consultations, rather than on legislative options, and extended the deadline to submit its report to December 15, 2015. The Panel submitted its final report (134 pages) to the Minister of Health and to you on December 15, 2015, supplemented by 9 annexes (295 pages). The CD provided with the report also included copies of 76 transcripts from the Panel's exchanges as well as written submissions which were received via the Panel's website and directly during consultations.

Scope of direct and online consultation activities
During its five-month schedule, the Panel held meetings with 73 individual experts in Canada, the United States, the Netherlands, Belgium, and Switzerland and consulted directly with 92 representatives of interveners, medical authorities, and stakeholders from 46 Canadian organizations. The Panel also received and considered 321 written submissions from civil-society organizations, academics, and individual citizens.

In addition to its direct consultation activities, the Panel posted an online questionnaire (the "Issue Book") on its website from August 20 to November 23, 2015. In total, 14,949 individuals completed the questionnaire. The Issue Book collected feedback from two separate groups of the general Canadian population. The first group, the "Open Public," included responses from all individuals who filled out the questionnaire on their own initiative (12,883 respondents in total). The Panel also sought the opinion of a second group of respondents, the "Representative

Sample," which included 2,066 responses from a nationally representative sample of Canadians. The purpose of this exercise was to enable the comparison of responses from Canadians who self-selected themselves to participate in the national discussion on physician-assisted dying (PAD), with the opinion of the average Canadian on this issue.

Main issues in focus

As defined in the Panel's terms of reference, the Panel's consultations focused on:

- the different forms of physician-assisted dying, namely assisted suicide and voluntary euthanasia;
- eligibility criteria and definition of key terms ;
- risks to individuals and society associated with physician-assisted dying; and
- safeguards to address risks and procedures for assessing requests for assistance in dying and the protection of physicians' freedom of conscience.

s.19(1)

CONSIDERATIONS

Professor Pelletier appeared on behalf of the External Panel before the Special Joint Committee on Physician-Assisted Dying on January 26, 2016. Some of the External Panel's key messages on this issue included the importance of: enabling access to PAD; implementing robust safeguards for vulnerable persons; establishing an efficient oversight mechanism; and improving palliative care. On the issue of eligibility, the Panel's online questionnaire revealed general support for PAD for patients with significant, life-threatening, and/or progressive conditions (58%) but only minority support for PAD for cases involving mental illness (29%) or disabilities (24%).

Professor Frazee also sent written submissions to the Committee on her personal behalf. She emphasized the potential negative impact of a PAD regime on those with disabilities, illnesses, or poor social determinants of health. She also recommended limiting eligibility to those in a state of irreversible physical decline and suggested the enactment of a mandatory vulnerability assessment by an interdisciplinary team, as part of the process to access PAD. Professor Frazee and Dr. Chochinow both helped develop the "Vulnerable Persons Standard," released on March 1, 2016, which proposes eligibility criteria for PAD similar to Quebec's law (i.e., for end-of-life patients only). A summary of the "Vulnerable Persons Standard" is presented in Annex 3.

CONCLUSION

The Panel members agree that while there are divergent views on many aspects of PAD, there are also areas of growing consensus, including the need for carefully considered safeguards, for an oversight mechanism, and a strengthened palliative care framework. According to the Panel, an

important goal in establishing a PAD regime in Canada should be to respect consensus as much as possible.

ANNEXES

s.19(1)

Annex 1: Panel Member Biographies
Annex 2: Panel's Terms of Reference
Annex 3: Summary of the "Vulnerable Persons Standard"
Annex 4: Summary of the Special Joint Committee's Report
Annex 5:

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Panel Member Biographies

Dr. Harvey Max Chochinov
O.C., O.M., M.D., Ph.D., FRCPC, FRSC, FCAHS
Chair

Dr. Harvey Max Chochinov is a Distinguished Professor of Psychiatry at the University of Manitoba and Director of the Manitoba Palliative Care Research Unit, CancerCare Manitoba. He holds the only Canada Research Chair in Palliative Care. His publications addressing psychosocial dimensions of palliative care have helped define core-competencies and standards of end-of-life care. He did his undergraduate medical training and Psychiatric Residency at the University of Manitoba and completed a Fellowship in Psychiatric Oncology at Memorial Sloan-Kettering Cancer Center, New York, New York. In 1998, he completed a PhD in the Faculty of Community Health Sciences, University of Manitoba. Dr. Chochinov is the Chair of the Canadian Virtual Hospice.

Dr. Chochinov's research has been supported by the Canadian Institutes of Health Research, the Canadian Cancer Society Research Institute and the National Institute of Health. His work has explored various psychiatric dimensions of palliative medicine, such as depression, desire for death, will to live and dignity at the end of life. He has been a guest lecturer in most major academic institutions around the world. He is the only psychiatrist in Canada to be designated as a Soros Faculty Scholar, Project on Death in America. He is a recipient of the Queen's Golden Jubilee Medal, the Order of Manitoba, and in 2014, was appointed an Officer in the Order of Canada. He is the Chair for the Canadian Virtual Hospice, a Fellow of the Royal Society of Canada and a Fellow of the Canadian Academy of Health Sciences. Besides many other national honors, in 2012 the Canadian Medical Association bestowed its highest recognition, the FNG Starr Award.

Dr. Chochinov has served on many prestigious boards, nationally and internationally. He was a member of the Governing Council of the Canadian Institutes of Health Research (CIHR) for seven years, during which time he also chaired the CIHR Standing Committee on Ethics. He is the only Canadian to serve on the Scientific Advisory Board of the National Palliative Care Research Center (NYC, USA); and the only Canadian to serve on the prestigious international scientific expert panel of the Cicely Saunders Foundation (London, UK). In addition to over 200 publications, he is the Co- Editor of the Handbook of Psychiatry in Palliative Medicine, published by Oxford University Press, and the Journal *Palliative and Support Care*, published

by Cambridge University Press. He is a member of editorial boards for most major journals of palliative care. His most recent book, *Dignity Therapy: Final Words for Final Days*, published by Oxford University Press, was the 2012 winner of the Association of American Publishers' Prose Award for Clinical Medicine.

Professor Catherine Frazee
O.C., D.Litt., LL.D.
Panel Member

Catherine Frazee is a Professor Emerita at Ryerson University where, prior to her retirement in 2010, she served as Professor of Distinction and Co-Director of the RBC Ryerson Institute for Disability Studies Research & Education. Through her scholarship, teaching, art and public service, she has challenged barriers to the full social inclusion of people with disabilities and contributed to reforms in areas ranging from artistic opportunity to legislation.

As the Chief Commissioner of the Ontario Human Rights Commission from 1989 to 1992, Dr. Frazee has worked for decades to advocate for human rights through her involvement with numerous organizations including the Women's Legal Education and Action Fund, the Canadian Association for Community Living, the Council of Canadians with Disabilities, and the Abilities Arts Festival (now Tangled Art + Disability).

She has provided expert testimony before Federal and Provincial Courts and Tribunals on human rights and disability disadvantage and contributed actively in Supreme Court of Canada interventions of strategic concern to disabled Canadians. She has authored a wide array of academic and literary texts and journals and published numerous opinion pieces in Canadian media on human rights, precarious citizenship, and the activist resistance of disabled people.

Dr. Frazee has also been particularly active in the exploration of cultural interpretations of the disability experience. Most notably, she was co-curator of the award-winning exhibition *Out From Under: Disability, History and Things to Remember* and a collaborator in the 2006 National Film Board film *Shameless: The ART of Disability*. She has received a number of awards including honorary degrees from Dalhousie University, the University of New Brunswick and McMaster University.

Dr. Frazee was appointed an Officer of the Order of Canada in December 2014 for "her advancement of the rights of persons with disabilities, and as an advocate for social justice".

Professor Benoît Pelletier
O.Q., Ad. E., LL.B., LL.M., LL.D., LL.D., FRSC, LL.D. (Hon.)
Panel Member

Admitted to the Barreau du Québec in 1982, Benoît Pelletier first practiced law in civil litigation and real estate law with the Department of Justice Canada (1983 to 1989) and with Legal Services of Correctional Service Canada (in 1989 and 1990) in Ottawa. In 1990, he joined the faculty at the University of Ottawa's Faculty of Law, which he still belongs to and where he currently holds the position of full professor. Benoît Pelletier also held the position of assistant dean of that faculty of law from 1996 to 1998.

For 10 years, Benoît Pelletier represented the Chapleau riding in the National Assembly of Québec. He was a minister with the Government of Québec for nearly six years. In that role, he was responsible for such things as Canadian Intergovernmental Affairs, Canadian Francophonie, Aboriginal Affairs and Reform of Democratic Institutions. With a Bachelor of Law from Université Laval, Benoît Pelletier also holds a Master of Law from the University of Ottawa and two Doctors of Law, one from the Université de Paris I Panthéon-Sorbonne) and the other from theUniversité Aix Marseille III.

In 1989, Benoît Pelletier received the Medal of the Barreau de Paris, as best student in the graduate studies law programs of the University of Ottawa. In 1998, he was issued the Award of Excellence in Teaching from the University of Ottawa.

Benoît Pelletier is the author of numerous scientific publications, including a major treaty on constitutional amendment in Canada (published in 1996). He has also given numerous speeches in Canada and abroad. He was received as a guest professor by the universities of Nantes, Corse, Paris II, Paris V and Lyon III. He was also received twice, in 2007 and 2009, as Public Policy Scholar by the Woodrow Wilson International Center for Scholars in Washington.

Benoît Pelletier is also the author of a political essay, published in 2010 by the Université Laval presses, entitled *Une certaine idée du Québec.* Parcours d'un fédéraliste. De la réflexion à l'action.

Since 2006, Mr. Pelletier has received numerous awards and distinctions for his contributions to the promotion and development of the French language and to strengthening and enriching relations between Francophones and Francophiles both in Canada and internationally. In 2010, he was appointed a Commander of the Ordre de la Pléiade, to underscore his outstanding

contribution to international francophonie. In 2011, he was made a Commander of the Royal Order of the Crown of Belgium. In 2012, he was made a Knight in the Ordre national du mérite de France. In 2013, he was awarded the Queen Elizabeth II Diamond Jubilee Medal. In 2014, Benoît Pelletier was made an Officer in the Ordre national du Québec. In 2015, he received the gold medal of the Ordre du mérite de la Fédération des commissions scolaires du Québec, for his outstanding contribution to public education.

External Panel on options for a legislative response to *Carter v. Canada*

Terms of Reference

1. Context

On February 6, 2015, the Supreme Court of Canada released its decision in *Carter v. Canada*. Sections 241(b) and 14 of the *Criminal Code* currently make it illegal for anyone, including a doctor, to assist in the death of another person who consents to die. The Court found that these laws were unconstitutional to the extent that they prohibit physician-assisted dying for competent adult persons who consent to the termination of life and have a grievous and irremediable medical condition that causes enduring suffering. The Court ordered that the *Criminal Code* provisions remain in force until February 6, 2016 to give Parliament time to respond.

To inform the Government of Canada's legislative response to the ruling, consultations with key stakeholders, medical authorities and the Canadian public are essential.

2. Mandate

The mandate of the External Panel on options for a legislative response to *Carter v. Canada* (the Panel) is to engage Canadians and key stakeholders in consultation on issues that are fundamental to a federal legislative response to the *Carter* ruling. Rather than providing a recommended legislative approach, the Panel will provide a final report to the Ministers of Justice and Health that outlines key findings and options for a legislative response for consideration by the Ministers.

3. Scope

3.1 The Panel will consult on issues fundamental to a federal legislative response that fall within the parameters of the ruling in *Carter v. Canada,* i.e. the giving of assistance in dying by physicians to competent adults who consent and meet the *Carter v. Canada* criteria.

3.2 To help guide discussions, the Panel's consultation activities will be focused on the following key issues:

a) Different forms of physician-assisted dying (assisted suicide and voluntary euthanasia);
b) Eligibility criteria and definition of key terms;
c) Risks to individuals and society associated with physician-assisted dying; and
d) Safeguards to address risks and procedures for assessing requests for assistance in dying and the protection of physicians' freedom of conscience.

3.3 In carrying out its mandate, the Panel will be mindful of federal and provincial/territorial jurisdictions in health and criminal law and will primarily focus on those issues that are under federal responsibility. However, the Panel will be able to hear and report on any input it receives that is outside of this scope.

4. Membership

4.1 Panelists and a Chair will be appointed by the Minister of Justice with input from the Minister of Health.

4.2 Panelists will be recruited through a targeted nomination process. The Panel will consist of three panelists, chosen based on their knowledge, expertise, and experience.

4.3 The responsibilities of panelists include:

a) Familiarizing themselves with key documents and issues relevant to their mandate, through the review of written documents and verbal briefings;
b) Participating in Panel meetings, which may include webinars, email exchanges, conference calls, and videoconferencing;
c) Participating in consultation activities related to the Panel's mandate, if requested by the Chair;
d) Making presentations to consultation audiences, when requested to do so by the Chair;
e) Participating in discussions on legislative options and the Panel's report to Ministers;
f) Notifying the Secretariat and the Chair of any changes in their affiliations and interests related to the Panel's mandate during their tenure; and
g) Directing any media inquiries to the Chair and notifying the Secretariat about the inquiry.

4.4 The Chair of the Panel has additional responsibilities, including:

a) Chairing Panel meetings and consultation sessions;
b) Liaising with the Panel's Secretariat on an ongoing basis;
c) Inviting panelists or external subject-matter experts to make a presentation at a meeting, when relevant and appropriate;
d) Facilitating a full and frank discussion among panelists in fulfillment of the Panel's mandate, including formulating legislative options and the report to Ministers;
e) Identifying when information and discussions are considered confidential and clarifying expectations regarding this protected information;
f) Ensuring the preparation of the meeting records or report and the delivery of the Panel's findings to Ministers;
g) Ensuring that the diversity of opinions are noted in the records from consultation sessions and the final report;
h) Acting as the media spokesperson for the Panel;

i) Obtaining pre-approval from the Executive Director of the Secretariat for all communications/messaging with the media; and
j) Supporting, in any other way, the fulfillment of the Panel's mandate.

5. Consultation Process

5.1 The Panel will conduct the following consultation activities in fulfilment of its mandate:

- Bilateral or multilateral discussions with interveners in the *Carter v. Canada* case and relevant medical authorities; and
- Online consultation open to all Canadians and other stakeholders.

5.2 The consultation process will cease during the election period.

6. Conduct, Conflict of Interest and Security Clearance

6.1 Panelists are expected to interact in an unbiased, professional, respectful and fair way with the Chair, other panelists, the Secretariat, government officials, key stakeholders, and the general public. They may not use their position on the Panel for their private gain or for the gain of any other person, company, or organization.

6.2 To be considered for appointment, potential panelists are required to complete and return an *Affiliations and Interests Declaration Form*. Panelists must update their declaration in writing whenever their situation changes.

6.3 In keeping with the *Privacy Act*, a completed *Affiliations and Interests Declaration Form* is considered confidential. Information in the form will not be made public without the panelist's permission. However, as a condition of membership, panelists will allow Justice Canada and/or Health Canada to publish, online and in print, a *Summary of Expertise, Experience, and Affiliations and Interests*, based on the completed declaration form.

6.4 All panelists are required to obtain an appropriate security clearance. The required forms will be provided to candidates.

7. Confidentiality

7.1 Panelists may receive confidential information in the course of conducting consultation activities. A *Confidentiality Agreement* must be signed before participating in the Panel as a member, presenter, or observer.

7.2 The *Confidentiality Agreement* prohibits the disclosure of any confidential information received through participation in the Panel, including information received orally or in writing, through email correspondence, telephone calls, print materials,

meeting discussions, etc. The final report of the Panel is also considered confidential information until its release by the Ministers of Justice and Health.

7.3 Information provided to the Panel from Justice Canada or Health Canada will be marked according to the level to which it is protected under the *Policy on Government Security.*

7.4 The Chair will ensure that everyone participating in the meeting, telephone discussion, email exchange, or in another form of communication has received clear instructions on the confidentiality of the proceedings.

8. Indemnification

8.1 Justice Canada undertakes to provide volunteer members with protection against civil liability provided the volunteer member acts in good faith, within the scope of the Panel's mandate, does not act against the interests of the Crown and does not have available to him/her such protection.

8.2 The volunteer member shall give prompt notice to Justice Canada of any claim, action, suit or proceeding brought against the member. If the volunteer member is eligible for protection against civil liability, Justice Canada must consent to the legal counsel selected to represent the volunteer member and any associated costs, or Justice Canada will not provide coverage to defend the claim, action, suit or proceeding. Justice Canada will, at its own expense, participate in the conduct of the defence of any such claim, action, suit or proceeding, and any negotiations for the settlement of the same. Justice Canada shall not be liable to indemnify the member for payment of any settlement, unless it has consented to the settlement.

9. Secretariat

Justice Canada, in collaboration with Health Canada, will provide for a dedicated Secretariat to support the Panel.

10. Panel Operations

10.1 The Panel will be established as an ad-hoc body, to remain operational until its final report is provided to the Ministers of Justice and Health.

10.2 The Panel will be responsible for finalizing its consultation activities in collaboration with the Secretariat.

10.3 The Panel will endeavour to coordinate its consultation activities with any related processes being undertaken by provinces and territories.

10.4 The Panel may not exceed its approved budget in the implementation of consultation activities.

10.5 Panelists will be reimbursed for expenses incurred on approved travel for the Panel, such as trip costs and accommodation, according to the Treasury Board's *Directive on Travel, Hospitality, Conference and Event Expenditures.*

10.6 It is preferable for a panelist to provide 14 days' notice of the intent to resign. The resignation letter must be in writing and be addressed to the Executive Director of the Secretariat, with a copy to the Chair if applicable. The letter should state the effective date of the resignation.

10.7 The Minister of Justice, with input from the Minister of Health, may end an appointment by writing to the panelist stating the reasons the appointment is being concluded and the effective date.

11. Deliverables

The Panel is responsible for delivering a final report, including a summary of key findings and options for a legislative response, to the Ministers of Justice and Health by November 15, 2015. The Ministers are responsible for determining the timing and mode of release of the Report and will consult the Chair of the Panel before proceeding.

Overview of the "Vulnerable Persons Standard" for Physician Assisted Dying Released on March 1, 2016 by Canadian Non-Governmental Organizations

Summary

The Vulnerable Persons Standard is a set of proposals for a Canadian physician-assisted dying (PAD) regime that was released at a press conference held by several non-governmental organizations on March 1, 2016.

Supporters of the Standard include national disability rights organizations, the Canadian Society of Palliative Care Physicians, religious organizations, and several individuals, including Catherine Frazee, former member of the Federal External Panel, as well as David Baker, Trudo Lemmens, and Michael Bach, who appeared at the Special Joint Committee (SJC) and recommended model legislation that the Standard broadly reflects.

In many respects, the Standard proposes eligibility criteria for PAD similar to Quebec's *Act Respecting End-of-Life Care*, in that patients would have to be suffering from an end-of-life condition in a state of advanced weakening capabilities with no chance of improvement. Also like Quebec, the Standard would not permit PAD for minors, or allow for advance requests to PAD for patients who later become incompetent at the time of administration. Unlike Quebec's law however, the Standard also proposes a requirement for prior review of PAD requests by a judge or independent body, such as provincial consent and capacity boards.

The Standard further proposes that these elements be included in the *Criminal Code* to ensure national consistency, calling for a high level of federal involvement in the PAD regime.

The Standard would run contrary to many of the SJC majority report's recommendations, including its eligibility recommendations that PAD be available for psychiatric suffering, for persons under 18, or by advance request. The Standard also calls for procedural safeguards above what the SJC majority recommended (e.g., pre-approval of requests, specialist involvement).

Overview of Each Element of the Vulnerable Persons Standard

The Vulnerable Persons Standard is a set of five proposed elements for a Canadian physician-assisted dying (PAD) regime. The elements of the Standard relate to eligibility for PAD as well as procedural safeguards and monitoring. Each element is described below:

1. ***Equal Protection for Vulnerable Persons:*** *The right to the equal protection and equal benefit of the law without discrimination must be preserved for all. Amendments to the Criminal Code concerning physician-assisted death must not perpetuate disadvantage or contribute to social vulnerability.*

This element of the standard calls for perambulatory language in the *Criminal Code* exemption affirming the inherent dignity of all life. It also calls for a careful monitoring of PAD, including public reporting and addressing any harms that are identified as PAD is implemented, and improving palliative care for all Canadians.

2. ***End-of-life Condition:*** *Physician-assisted death is only authorized for end-of-life conditions for adults in a state of advanced weakening capacities with no chance of improvement and who have enduring and intolerable suffering as a result of a grievous and irremediable medical condition.*

This element generally mirrors the eligibility requirements for PAD in Quebec's legislation. By restricting PAD to end-of-life conditions, by implication it would not allow PAD for cases of non-life threatening physical disabilities or solely psychological suffering. This element also proposes a procedural safeguard of an assessment of the patient's medical condition by two independent physicians, who must have specific expertise in relation to the person's condition as well as the appropriate care options for it.

3. ***Voluntary and Capable Consent****: Voluntariness, non-ambivalence and decisional capacity are required to request and consent to an assisted death, including immediately prior to death.*

By requiring voluntariness and capacity at the time immediately prior to death, this element would exclude "advance requests" for PAD by individuals who become incompetent at the time of administration. The standard also specifically calls for the evaluating physicians to specifically attest that the request for PAD is free from undue influence, that the patient is capable of making the request, is aware of all alternatives, and has been supported to pursue other alternatives including palliative care.

4. ***Assessment of Suffering and Vulnerability****: A request for physician-assisted death requires a careful exploration of the causes of a patient's suffering as well as any inducements that may arise from psychosocial or non-medical conditions and circumstance.*

This element of the standard would require that the physicians consult with the patient's extended health care team and explore whether factors unrelated to their medical condition are motivating the request for PAD. It also states that efforts must be made to address the patient's suffering through palliative care and "other means" depending on the circumstances.

5. ***Arms-Length Authorization****: The request for physician-assisted death is subject to an expedited prior review and authorization by a judge or independent body with expertise in the fields of health care, ethics and law. The law, the eligibility assessment process, and mechanisms for arms-length prior review and authorization are both transparent and consistent across Canada.*

This element proposes a procedural safeguard of mandatory pre-approval of PAD requests by a judge or independent expert body. The Standard suggests that these decisions could be made on an expedited basis appropriate to the patient's prognosis, with flexible degrees of formality and expertise depending on the circumstances.

Significantly, this element also calls for all of the above eligibility criteria and procedural safeguards to be reflected in the *Criminal Code* to ensure national consistency, which would imply a high level of federal involvement.

Summary of Special Joint Committee on Physician-Assisted-Dying Report

- The Special Joint Committee on Physician-Assisted-Dying (PAD) was established pursuant to motions passed by both Houses of Parliament on December 11, 2015. The Committee's membership included five senators and eleven Members of Parliament. In January and February 2016, the Committee held 16 meetings, heard from 61 witnesses and received over 100 briefs. It tabled its final report in Parliament on February 25, 2016.

- The Report contains 21 recommendations from the majority (all Senators and Liberal MPs) on the key issues relating to a PAD regime. It also includes a minority dissenting opinion (by Conservative MPs), and a minority supplementary opinion (by NDP MPs).

- The Committee endorses the term "medical assistance in dying" (MAID), instead of "physician-assisted dying". This term is understood to include both "voluntary euthanasia" administered by a physician through a lethal injection, and "physician-assisted suicide", the self-administration of lethal medication provided by the physician.

- PAD eligibility would include non-life-threatening conditions, mental illnesses, and advance requests to permit PAD for incompetent patients. After three years of study, minors would also be eligible.

- In terms of procedural safeguards, the Committee identifies three for assessing PAD requests: Two independent physicians, written witnessed request, and a proportionate reflection period, but does not recommend that they be legislated at the federal level. Instead, it recommends that the Government work with the Provinces and Territories (PTs) and medical regulatory authorities to establish or ensure that such safeguards be applied to PAD requests.

- In terms of an oversight/monitoring regime, Instead, the Committee recommends that Health Canada lead a cooperative process with the PTs.

- The Committee also recommended that the federal government work with the PTs to ensure that physicians have an obligation to effectively refer eligible patients for PAD, and that publicly-funded healthcare institutions be obliged to offer PAD.

- The Committee also recommended that improvements be made to palliative care, mental health care, supports for persons with dementia and their families, and culturally-appropriate end-of-life services for Indigenous patients.

- The Conservative members of Parliament wrote a minority report that was critical of the scope of eligibility recommended by the majority, and preferred the narrower approach of Quebec's law. The NDP wrote a supplementary report recommending further improvements to palliative care than those proposed by the majority.

s.21(1)(a)

s.21(1)(b)

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